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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943.

No. 415

MEYER ABRAMS, HARRY J. MYERSON AND FANNIE B. STERN, EXECUTRIX OF THE ESTATE OF JOSEPH L. STERN, DECEASED,

Petitioners,

v.

CLEVELAND TERMINALS BUILDING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1943.

No.

MEYER ABRAMS, HARRY J. MYERSON and FANNIE B. STERN, Executrix of the Estate of Joseph L. Stern, Deceased,

Petitioners,

v.

CLEVELAND TERMINALS BUILDING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the United States:

Petitioners, Meyer Abrams, Harry J. Myerson and Fannie B. Stern, Executrix of the Estate of Joseph L. Stern, Deceased, hereby petition for the issuance of a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, whose judgment was made final on August 31, 1943, when it denied a rehearing from its decision of May 31, 1943, affirming the judgment below.

STATEMENT OF THE MATTER INVOLVED.

The subject-matter of this petition involves the construction of Federal Rules 52 (a) and 53 (e) 2, and the effect of non-compliance with Rule 53 (e) 2 on the application of Rule 52 (a).

The District Court refused to grant the petitioners a "hearing" as required under Rule 53 (e) 2 when it overruled their objections to the report of a special Master, without notice, without opportunity to be heard, and without examining the evidence, notwithstanding the fact that the objections were filed on the ground that the report was not sustained by any evidence in the case and that demand was made for a "hearing" on the face of the objections.

The Court of Appeals applied Rule 53 (e) 2 in affirming the decision below (requiring it not to disturb the judgment below unless it was "clearly erroneous") notwithstanding the fact that the trial Judge did not examine the evidence and refused to grant to the petitioners a "hearing" as required under the Rule.

Petitioners filed a petition for rehearing after the rendition of the decision applying Rule 53 (e) 2. The petition for rehearing urged (R. II, p. 133):

> "The *per curiam* opinion *completely overlooked* the principal point on which the reversal was sought, namely, that the District Court *did not accord Appellants a hearing pursuant to Rule* 53 (e) 2. The findings, therefore, were *not* the 'concurrent findings of the District Judge and the Master' as stated in the opinion, but were *only* findings of a Master (*who was biased*) adopted *ex parte* by a Judge *without examining the evidence,* without hearing arguments and without affording the objectors the opportunity to be heard."

It was expressly pointed out in the petition (R. II 134):

> "The rule that a court of appeals will not disturb the *concurrent findings* of a Master and a Judge, is founded on the theory that 'appellant has had *two* chances and when two minds arrive at the same conclusion there is a strong presumption in favor of the correctness of the decision (*Thompson* v. *Smith*, 156 N. C. 345). It is inapplicable where *no such chance was had.* A Judge is not permitted to pass on objections to a Master's report in a perfunctory way but must use his own faculties and ascertain the truth."

The petition for rehearing further stated (R. II 135):

> "Appellant did not have the concurrent findings of a Master and a Judge, and the opinion is based on the misconception of the record. There is, therefore, *an apparent error of law which entered into the determination of the questions involved,* which this court overlooked, and a rehearing should be granted."

The petition further urged (R. II p. 135):

> "This Court affirmed the order below on the ground that 'no error of law affecting the determination of this controversy on appeal has been found.' It is evident that *the court entirely overlooked* Point I (b) of our Brief (p. 18) and the discussion thereof in the Reply (p. 13), which cited the Wisconsin case (232 Wis. 274, 294), on the point that *a "hearing" includes "oral argument".* We also cited the *Securities and Exchange Commission* case (84 F. (2d) 316, 318) on the point that the term 'hearing' presupposes a formal *proceeding 'upon notice' and on an opportunity to be heard.'* We also called attention to the fact that a "hearing" was fixed by the court originally and that thereafter the court entered an order *postponing the "hearing"* to be had upon due notice and that *no such notice was ever given and no hearing was ever had.* On the face of the record it appears there was an error of law and the statement of the court to the contrary is based on misconception of the record."

The petition for rehearing also urged (R. II p. 137):

> "We also urged in our Brief (p. 20) that the rule that the concurring findings of the Judge and Master is inapplicable to the instant case because *the findings in the instant case were not based on credibility of witnesses, but on inferences drawn from documentary proof,* and that the rule that a reviewing court will not disturb concurrent findings, is inapplicable to the instant case. We cited in our Reply Brief (p. 13) the decisions of this court sustaining our contention. Without noticing this distinction, this court based its opinion on the rule which is inapplicable to this case."

It is also stated in the petition for rehearing (R. II p. 138):

> "In order to constitute concurrent findings, it is necessary that the Judge afford an opportunity to the objectors to be present in court and to be heard on the objections, to present their argument, and it is necessary for the court to examine the evidence, all of which was not done in the instant case. There was, therefore, no concurrent findings, and the opinion is based on a misconception of the record."

The court thereafter denied a rehearing, without any opinion (R. II p. 143).

THE QUESTIONS PRESENTED.

The petition presents the following questions for the consideration of the Court:

1. Whether Rule 53 (e) 2 was mandatory on the District Court, and whether it was proper for the Judge to pass on the objections in the face of a demand for a hearing, and the propriety of the action of the Court of Appeals in affirming the judgment on the ground that Rule 53 (e) 2 required such affirmance.

2. May a decision of a Judge (in ruling on objections to a special Master's report involving examination of evidence) be sustained on the theory that Rule 53 (e) 2 required an affirmance unless the judgment was "clearly erroneous", when the Judge failed to accord the objectors an opportunity to be "heard", to examine the evidence, and abdicated his function in favor of the judgment of the special Master, on the ground that the Master was better able to judge the subject-matter than he, the Judge?

3. Whether the findings of the special Master that petitioners were not entitled to any compensation for certain services rendered to the estate (which included the elimination of two claims in excess of $10,250,000.00) were supported by any evidence, and whether Rule 53 (e) 2 was properly applied to a case where the findings were not based on controversial matters, but merely on deductions and inferences from uncontroverted evidence.

4. Whether the report of a biased Master, which was approved by a Judge, without notice, without hearing, and without examination of evidence, may be affirmed by reason of Rule 53 (e) 2.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The construction of Rules 52 (a) and 53 (e) 2 involves important questions of Federal Procedure, and deserves the exercise of the discretionary power of this Court to issue the writ (*R. F. C.* v. *Bankers Trust Co.*, 318 U. S. 163, 166).

2. The question whether the words "notice" and "hearings" under Rule 53 (e) 2 includes an opportunity to be present in court, to present the evidence in support

of the objections, argument of counsel, and to have notice and opportunity to be heard, as contended by the petitioners, or whether the word "hearing" only means a reading of the report and objections, and the affirmance thereof on the ground that a special Master was better able to judge than the Judge, constitutes the "hearing" contemplated under that rule (as determined by the Circuit Court of Appeals) is an important question which deserves the issuance of the writ to review the decision.

The word "hearing" includes "oral argument" (*State* v. *Millohols*, 195 N. W. 292, 295 (N. D.); *Denver & R. G. W. R. Co.*, 32 F. Supp. 244, 245; *Securities and Exchange Commission*, 84 F. (2d) 316, 318; *Harrison* v. *Commissioner of Internal Revenue*, 107 F. (2d) 341).

The decision of the Sixth Circuit which affirmed the judgment below when the court failed to comply with Rule 53 (e) 2 in relation to the failure to give notice, the absence of a motion and failure to accord the petitioners the opportunity to be heard, is in conflict with the decision of the Eighth Circuit (*Ettman* v. *Federal Life Ins. Co.*, 137 F. (2d) 121), which held that the Federal rules of Civil Procedure govern pleadings, practice, and procedure in courts of the United States, and that these rules contemplate a trial on the merits in accordance with the evidence and applicable law. It is contrary to the decision in *Rosenberg* v. *Heffron*, 131 F. (2d) 80, which held that Rule 53 (e) 2 is applicable to bankruptcy cases.

While none of these cases deal with Rule 53 (e) 2, we believe that the construction of the word "hearing" as applied to general equity cases, is equally applicable to Rule 53 (e) 2. In *Re Denver supra* the court defines the term "hearing" in bankruptcy to include "notice" and "argument of counsel" to meet the test of "due process".

3. The question whether Rule 53 (e) 2 may be applied to a case where the Court adopted the findings of a special Master without examining the evidence and without affording the petitioners an opportunity to present the record in support of the objections is of utmost importance in the administration of Federal Procedure and the writ should be issued.

PRAYER FOR RELIEF.

WHEREFORE, the above petitioners by their counsel PRAY the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, to the end that the judgment may be reversed, and for such other relief as to the Court may seem fit.

MEYER ABRAMS,
HARRY J. MYERSON,
FANNIE B. STERN, Executrix of the Estate of Joseph L. Stern, Deceased.

By MEYER ABRAMS,
HARRY J. MYERSON,
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Their Counsel.

October 4, 1943.

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BRIEF IN SUPPORT OF PETITION.

A.

JURISDICTION INVOKED.

The jurisdiction of this Court to grant the Writ is invoked under 240 (a) of the Judicial Code as amended by the Act of November 13, 1925 (42 Stat. 1938, 28th U. S. C. A. § 47). The judgment of the United States Circuit Court of Appeals for the Sixth Circuit, affirming the decision below was rendered May 31, 1943 (R. II, p. 132) and was made final by the denial of the rehearing on August 31, 1943 (R. II, p. 143). The petition is filed within the statutory period.

B.

OPINIONS BELOW.

The opinion below of the District Court is not published and appears in the printed record (R. I, p. 705). The opinion of the Court of Appeals is published in the Advance Sheets of the Federal Reporter (136 F. (2d) 537), and appears in the record (R. II, p. 132).

C.

ARGUMENT.

A STATEMENT OF THE CASE.

Petitioners are attorneys for a group of creditors known as "Gochenour, *et al.*," who performed services from 1936 to 1942 in connection with the reorganization of the Cleveland Terminals Building Company under § 77-B of the Bankruptcy Act involving property of approximately $400,000,000.00. The services included the elimination of two claims held by the "parent" and another affiliated corporation in excess of $10,000,000.00, opposition to certain plans, and participation in the approval of the final Plan.

The petition for fees was referred to a Special Master together with other petitions, who recommended the allowance of $18,000.00 for certain of the services to the estate, and a denial of any compensation for the other services rendered. No appeal was prosecuted from the allowance of the $18,000.00 for the services for which the Master recommended the compensation, although the Master did not recommend the full amount requested. The appeal was only taken and allowed (R. I, pp. 1-2) from that portion of the Master's recommendation which was approved by the Court, denying *any* compensation for certain of the services rendered to the estate.

The Petition was divided into two parts: (a) services relating to administrative matters, inter-relationship of Parent and Subsidiary and their dominant officers, segre-

gation of funds, and reorganization plans (R. I, pp. 5-15), and (b) services concerning elimination of claims in excess of $19,000,000.00 (R. I, pp. 16-22).

Service for Which Allowance Was Made. The major part of the services performed by petitioners for which the $18,000.00 allowance was made, was their objections to the Morgan claims, which resulted in a reduction of approximately $6,000,000 from the claim as a result of a reversal of the Master and the District Court (*Gochenour, et al.* v. *J. P. Morgan & Co.*, 111 F. (2d) 378). Due to the fact that the appeal was not taken from the allowance, but merely from the *disallowance* (R. I, pp. 1-2), this subject-matter is not involved on this petition.

Service for Which No Allowance Was Made. The Debtor filed a claim for $10,272,146.00 for interest on its open acccount against the Subsidiary (R. I, p. 19). The total claim aggregated in excess of $37,000,000.00. Another claim was filed by the Terminal Company, a subsidiary, for principal and interest. Both claims were contested as to principal and interest by the petitioners, and was contested as to interest only by J. P. Morgan & Co.

The Trustees of the Debtor, who were "special counsel" in one capacity and "supervisors" of the Subsidiary in another capacity, sought to enforce the entire claim of $37,000,000.00 against the Subsidiary (R. I, p. 20). Petitioners proceeded with their objections to trial, offered evidence (R. 20) and filed a Brief (R. 21, 111), contending (a) that the entire claim was void because of the relationship of "parent" and "subsidiary" and (b) that under no theory could the "parent" collect interest from its subsidiary in the sum of $10,272,146.00.

The Master sustained their objections as well as the objections of Morgan's claim for interest (R. I, pp. 21, 301). In his report he relied on the objections and evidence of the petitioners (R. I, pp. 297-298). The trustees for the Debtor filed objections to his report, supported by Brief urging the allowance of the entire claim against the Subsidiary whose "supervisors" they were. The petitioners filed their Brief (R. I, p. 114) seeking to sustain the Master's report eliminating this claim. The District Court overruled the objections and sustained the petitioners and Morgan by eliminating the claim of $10,272,146.00 (R. I, p. 177).

Another affiliated Company, the Terminal Buildings Company, filed a claim for principal in excess of $1,500,000.00, and for interest in excess of $53,000.00 (R. I, p. 16). Petitioners filed similar objections as to the parent's claim, and performed similar services. The Master sustained them by eliminating the claim for $55,645.33 (R. I, p. 305), and the Court approved his report (R. I, p. 310).

No compensation was allowed for the services rendered by petitioners in eliminating these two claims in excess of $10,000,000.00.

No compensation was allowed for any of the services in the field of administration and in connection with the reorganization plans.

Services in the Field of Administration: Petitioners appeared before the Special Master on November 13, 1936, on the hearing on the question whether the Debtor and Subsidiary Debtor should remain in possession after the approval of their joint petition under § 77-B as filed in good faith. Petitioners opposed the continued possession of the Debtor and Subsidiary Debtor in possession and

urged the appointment of trustees on the ground of the adverse interests of the "parent" and its "subsidiary", who were controlled by the same persons who dominated them. They also urged the rejection and cancellation of a lease to the Chamber of Commerce for 10% of the entire area of the mortgaged premises on a percentage basis, which had been operated at a loss of approximately $25,-000 per year. At the conclusion of the hearing, the Master requested written briefs, which were filed by the petitioners (R. I, p. 72). The Master found (R. I, p. 224) that the interests of the Debtor and its Subsidiary, were dominated by the same officers and were *adverse*. Instead of recommending the appointment of trustees for the Subsidiary, the operating company, he recommended the appointment of trustees for the "parent", which was simply a "holding" company (R. I, p. 225).

Petitioners filed objections to that part of the report which recommended that the possession of the subsidiary debtor be not disturbed (R. I, p. 85) supported by a Brief (R. I, p. 88). The Court held the matter under advisement, and on February 5, 1937, it rendered its opinion sustaining the Master's report as to the appointment of trustees for the Debtor, and reserved jurisdiction to further consider the exceptions to his report as to the Subsidiary Debtor (R. I, p. 229). On February 8, 1937 the Court appointed Messrs. Lecke and Fogg as trustees for the Debtor, with power to act as their own counsel (R. I, p. 227), and on May 21, 1937, he overruled the objections *"without prejudice"* or further consideration if, upon a further showing, it would be necessary to appoint trustees (R.. I, p. 227).

Petitioners made a further showing on June 12, 1937 (R. I, p. 272) for the appointment of trustees of the Subsidiary Debtor. On July 14, 1937, the Court appointed "special counsel" for the Subsidiary as a "cure" to the adverse interests (R. I, p. 230).

On August 6, 1937, petitioners obtained leave to file objections to claims aggregating $85,000,000.00, the major part of which were filed by affiliated companies who were controlled by the same officers (R. I, p. 121). After granting such leave the Master appointed "special counsel" on August 10, 1937, to contest some of the claims. However, they filed no objections, nor did they contest any of the claims, until petitioners proceeded with the evidence in connection with the objections to the claim of J. P. Morgan & Co. Thereafter, "special counsel" adopted substantially petitioners' objections, and the Master stayed further hearings on petitioners' objections, with the right to them to participate in the suggestions and argument (R. I, p. 100).

The special Master finally recommended the appointment of the trustees for the Subsidiary Debtor on June 26, 1938 (R. I, p. 230). The Court, however, did not follow his recommendation, but added to the duties of the "trustees" for the "parent" and "special counsel" the further duty of "supervisors" for the Subsidiary, relieving them however from any duty concerning contest on claims or Reorganization Plans (R. I, p. 235).

Services in Field of Reorganization. On May 18, 1937, Debtor and Subsidiary filed a joint plan (R. I, p. 256), proposing to give to the leasehold bond owners in exchange for their principal debt of $6,000,000.00, plus accrued interest at 6% from June, 1932, Preferred stock in a corporation which was to acquire the mortgaged premises, and the Subsidiary was to be released from all its liabilities, thereby making all other assets free from the debt and the management of the property was to remain in the control of the same persons.

Petitioners filed objections to such plan on June 12, 1937 (R. I, pp. 10, 272), which objections were made

available to all creditors (R. I, pp. 12, 13). They also filed amended objections and proposed suggestions or amendments to the Plan, on August 6, 1937 (R. I, pp. 10, 11). Among the objections they urged (R. I, p. 11) that it would be inequitable to release the Subsidiary from its personal obligation of $6,000,000.00 on the bond issue, because the mortgaged premises were valued at less than the bond issue, and therefore it was improper to exclude the bond owners from their position as general creditors for the difference between the value of the mortgaged premises and the amount of their debt. They also objected on the ground that the $85,000,000.00 in claims, which were to be taken care of under that Plan, were held by affiliated Companies, and that the claims should be subject to careful scrutiny before giving them any participation under the Plan.

Petitioners suggested amendments to the Plan on June 12, 1937 (R. I, p. 275) and in the amended suggestion of August 6, 1937 (R. I, p. 98) recommending (a) the appraisal of the entire estate of the Debtor and its Subsidiary; (b) the reduction of the bond issue by $3,000,000.00 by new securities secured by the mortgaged property; (c) the allowance of a general claim for the balance in excess of $3,000,000.00; (d) safeguards as to the control of the corporate affairs and (e) the appointment of trustees for the Subsidiary debtor. They further suggested amendments to the subsequent plan of 1938 (R. 12).

After making available the objections and amendments to all creditors, two committees were organized—one in New York and another in Michigan (R. I, p. 13), who later cooperated in bringing about the final Reorganization Plan. Thus, petitioners' suggestions found their way in the final plan whereby the Tower Building property (the mortgaged premises) was appraised at $3,000,000.00 (R. I, p. 13). The leasehold bond owners were allowed a general claim of $4,685,256.02 (R. 279).

Petitioners were active until the adoption of the final Plan, and joined in the last communication to the creditors with the committees, urging them to accept the final Plan (R. I, p. 313).

The Evidence. Petitioners filed a verified petition (R. I, p. 137) supported by 44 exhibits (R. I, pp. 28-115) which were received in evidence (R. I, p. 138). They also appeared as witnesses and were cross-examined at length (R. I, pp. 117, 165). No evidence was offered in opposition to the application for fees, and the evidence is primarily based on documentary proof.

To support the claim for services rendered in the field of administration, there is the transcript of the proceedings (R. I, p. 226), the Brief which was filed with the Master (R. I, p. 72) and the Brief which was filed with the Court (R. I, p. 88), pointing out the adverse interests and the necessity for the appointment of independent trustees and counsel. In connection with segregation of certain funds, for which petitioners claimed compensation and which was not allowed them, there appears in the record their petition for segregation (R. I, p. 239). The services relating to the elimination of the two claims in excess of $10,000,000.00, are reflected by the two claims (R. I, pp. 103, 107), the Master's report relating to such claims (R. I, pp. 295, 305), and the order of the Court sustaining petitioner's objections thereto (R. I, pp. 303, 308).

The services relating to the objections to the Reorganization Plans appear from reading the objections of June 12, 1937 (R. I, p. 272), the amended objections and suggestions for modification of August 6, 1937 (R. I, p. 98), and from the suggestions for the modification of the 1938 Plan (R. I, p. 12).

The Report: After finding that petitioners performed certain services for which there was recommended an allowance of $18,000.00, the Master found that for the other services, petitioners were not entitled to *any* compensation. He stated in his report that petitioners made no contribution to any of the administrative matters (R. I, p. 180); that the elimination of the two claims in excess of $10,000,000.00 was not the result of petitioners' efforts (R. I, pp. 187, 188), and that petitioners did not contribute anything to the final Plan (R. I, p. 188); that the segregation of funds did not result from points urged by the petitioners (R. I, p. 187).

These findings were based on his inferences and deductions from the documentary proof and from his alleged knowledge of the debtor's affairs during the past six years when he served as special Master.

The Exceptions: Petitioners filed objections to his report (R. I, pp. 192-204). Among the objections they urged that the Master considered evidence which was not adduced at the hearing; that there was no foundation in the evidence to sustain his findings, and that his findings were contrary to the evidence, and that the Master was biased.

The Ruling of the Judge. The Judge did not examine any of the evidence, afforded no opportunity to the petitioners to have their day in court to support their objections by evidence or argument. He held that the special Master was better able to judge upon the allowance of the compensation than he, the Judge, and therefore adopted the Master's report. He even followed the Master's report in recommending only part of the refund of the expenses, notwithstanding the recommendation of the Securities Exchange Commission to refund all of the expenses (R. I, pp. 205-207).

The Errors: The Court of Appeals erred in sustaining the decision below on the ground that Rule 53 (e) 2 required it to confirm his order unless it was "clearly erroneous", when it appeared that the Court **did not afford the petitioners a hearing** as required under the Rule and that it abdicated its function in favor of the special Master.

The undenied proof demonstrates that petitioners performed valuable services to the estate, which was of great benefit to it; and if the Court had examined the evidence and afforded petitioners an opportunity to present their argument, supported by the evidence, it would have been forced to reject the Master's report, and the Circuit Court of Appeals erred in applying the Rule 53 (e) 2 to such a case.

I.

The Approval of the Master's Report Without Notice and Without a Hearing As Required By Rule 53 (e) 2 Required a Reversal of the Order Overruling the Objections, and to Sustain the Objections.

The Circuit Court of Appeals applied, on the one hand, one part of Rule 53 (e) 2* which authorized the Court to accept "the master's findings of fact unless clearly erroneous", and, on the other hand, overlooked the other part of the rule which requires a "motion", "notice" and a "hearing".

---

* Rule 53 (e) 2 is as follows:

"In an action to be tried without a jury, the court shall accept the master's findings of fact unless clearly erroneous. * * * Application to the court for action upon the report and upon the objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The court **after hearing** may adopt the report or may modify it or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions."

In the instant case there was a total noncompliance with the Rule. There was no motion, no notice, and no hearing. This, in spite of the *demand for a hearing* on the face of the objections (R. I, p. 204), and on the face of the Brief (R. I, p. 204), and in violation of the order of court of June 1, 1942, which stated that *a hearing would be set on due notice.*

Both Rules 52 (a) and 53 (e) 2 are expressly made to be applicable to Bankruptcy (*Perry* v. *Baumann,* 122 F. (2d) 409. These rules are *mandatory* upon the District Court (*Shannon* v. *Retail Clerks Int. P. Ass'n,* 128 F. (2d) 553, 555). In addition to Rule 53 (e) 2, order No. 47 in Bankruptcy provides that "the Judge after *hearing* may adopt the report or modify it." There was no notice, no motion and no hearing, and therefore the District Court was without power to adopt the Master's report, and it became the duty of the Court of Appeals to reverse its order. This was urged in the reply brief and in the petition for reeharing.

The term "hearing" presupposes proceedings "upon notice" (*In re Securities and Exchange Commission,* 84 Fed. (2d) 316, 318). A "hearing" is an "equity term" and is properly "applied to the argument" (*Miller* v. *Tobin,* 18 Fed. 609, 616). It includes "the testimony and the argument" (*West Chicago Park Commissioners* v. *Riddle,* 151 Ill. 487). The term "hearing" includes "argument" (*Harrison* v. *Commissioner of Internal Revenue,* 107 F. (2d) 341, 342).

Petitioners stated in the petition for rehearing under the heading "Denial of Hearing" (R. II, p. 135):

> This court affirmed the order below on the ground that "no error of law affecting the determination

of this controversy on appeal has been found". It is evident that *the court entirely overlooked* Point I (b) of our Brief (p. 18) and the discussion thereof in the Reply (p. 13), which cited the Wisconsin case (232 Wis. 274, 294), on the point that the term "hearing" *presupposes a formal proceeding* "upon notice" and an opportunity "to be heard". We also called attention to the fact that a "hearing" *was fixed originally* and that thereafter the court entered an order *postponing* the "hearing" to be had upon *due notice* and that *no such notice was ever given and no hearing was ever had.*

The petition also stated (R. II, p. 136):

> On the face of the record *it appears that there was an error of law* and the statement of the court to the contrary is based on a misconception of the record. In addition to the cases cited in the Brief and Reply, we desire to call attention to the *requirement* of Rule 53 (e) 2 for "notice" and opportunity to be "heard" and that failure to give "notice" and afford an opportunity to be "heard" is *not due process.* "Argument of counsel" is embraced in the term "hearing" and "due process". (*Re Denver R. Co.*, 32 F. Supp. 234, 235.)

The petition further urged (R. II, p. 136):

> The construction of the term "hearing" and "notice" came up before this court in *Harrison* v. *Commissioner of Internal Revenue,* 107 F. (2d) 341. *This court there held that oral "argument" of counsel was included in the term "hearing".* This court reversed the decision below for non-compliance with statutory "notice" and an opportunity to be "heard", notwithstanding the fact that the trial court did receive the memorandum of law from respective counsel. There, no demand for argument and hearing was made, while here *such a demand was made and refused.* The word "hearing" contemplates an opportunity to be "heard" not only to be "present" but also "the right to present one's

contention, and to support the same by proof and argument. *State* v. *Millhols,* 195 N. W. 292, 295 (N. D.)."

It was the duty of the Court of Appeals to grant the rehearing when its attention was called to the violation of the Mandatory Rule.

II.

The District Court Was Required to Examine the Evidence on Ruling on the Objections Which Were Based on the Contention That There Was No Evidence to Support the Master's Findings. It was the Duty of the Court of Appeals to Reverse the Order, Which Was the Result of a Failure to Examine the Evidence and to Hear the Argument.

A reading of the opinion of the District Judge (R. I, p. 207) will be sufficient to convince this Court that the Judge did not examine the evidence. The objections specifically pointed out that there was no evidence to sustain the Master's findings (R. I, p. 192). Where the objections challenged the sufficiency of the evidence to support the findings, the court is duty-bound to examine the evidence and to afford the objector the opportunity to show by the evidence that the objections were well founded. (*Foote Bros.* v. *National Land Bank,* 114 F. (2d) 611, 621; *Holt* v. *Johnson,* 128 N. C. 67; *Jones* v. *Van Horn,* 28 Colo. 127.) This alone required a reversal of the order.

III.

The Findings Were Contrary to the Uncontroverted Evidence, and the Circuit Court of Appeals Clearly Erred in Not Reversing the Order Sustaining the Master's Report.

The Special Master discussed the services which were outlined in the petition under sub-headings 1 to 7. We will not discuss all of these sub-headings, as it is sufficient to illustrate that he clearly erred as to some of these matters and that we are entitled to a reversal on the merits. Upon the allowance of the writ, we will discuss the other phases.

Administrative Matters: In discussing the point concerning the services relating to administrative matters under the heading:

> **"1. The Administration of the Estate Received the Benefit of Independent Supervision Under the Orders of the Court"**

the Master says (R. I, p. 180), that the statement that petitioners' efforts contributed to the benefits resulting from independent supervision, is "untrue". According to him, petitioners were not entitled to *any* compensation for the appointment of the Trustees for the Debtor, because their clients were neither stockholders nor creditors of the Debtor, but of the Subsidiary (R. I, p. 181). The Subsidiary was a mere *adjunct* of the Debtor, and the creditors of the subsidiary were vitally affected by *their joint Reorganization Plan*, whereby the Debtor would have received a part of the assets available to the creditors of the Subsidiary in payment of the Debtor's claim in excess of $37,000,000.00 against the Subsidiary.

The Master held that petitioners were not entitled to any compensation because their efforts did not contribute to the appointment of Trustees for the Debtor and independent counsel and supervisors for the Subsidiary (R. I, pp. 72, 75). This is refuted by the transcript of the proceedings of November 13, 1936 (R. I, p. 236), the brief filed with the Master (R. I, p. 75) and by the brief filed with the court.

Point I of the brief pointed out (R. I. p. 75)* that the Debtor and Subsidiary Debtor and their officers and managers were disqualified because of their adverse interest and that it was necessary to appoint impartial Trustees for the protection of the creditors.

Under subdivision (a) the attention of the Master was called (R. I, p. 79) to *the violation of the cardinal rule that one may not serve two masters.* Many authorities were cited on the duty of the court of bankruptcy to appoint independent Trustees and disinterested counsel when it appeared that the interest of the dominant stockholders and officers were adverse. It pointed out that after they succeeded in carrying out the voluntary plan of 1932 whereby the *fixed* interest and *sinking* fund requirements were *abolished* and the Subsidiary Debtor was permitted to operate the premises and apply the *net* income in payment of interest, *they so mismanaged the affairs that not one cent was distributed from June,* 1932, *to the date of the hearing—November* 13, 1936. During the entire period all that there was available for the application of the net income was $750.00. The brief pointed out that this was *not due to lack of income* but to

* The printed record does not contain the whole brief but merely an outline, but the entire brief was filed as an exhibit and the Court of Appeals authorized the printing of portions of the record (R. II, p. 131).

bad management because of the reductions in leases and failure to collect from affiliated companies. The brief stated (R. I, p. 79):

> "A glance at the directorate of the Debtor and of the Subsidiary Debtor will disclose that they were substantially the same. The Debtor is the sole owner of the Subsidiary Debtor; was interested in allowing its other subsidiaries, Vaness and Higbee, to remain in possession and pay as little as possible after they arranged to pay the bondholders from the net income, if any. They so managed the affairs that there was indeed no net income."

Petitioners asked (R. 79):

> "Should such persons, who so betrayed the interest of the investors and who mismanaged the properties to their own advantage, be further permitted to continue in operation?"

The question suggested the answer that a Trustee should have been appointed.

Point II of the brief (R. 80) discussed the testimony of Vice President Sharpe, who was managing the property. It called the attention of the Master to the fact that "*this manager who collected from the Vaness Company whatever amount he was told to collect by his superior, Bradley, without regard to written lease,* evaded giving proper answers to questions and at first gave the impression that the rental for the Higbee lease was $115,180.68, but *after further cross-examination he confessed that the rental was* $144,055, *but he accepted an annual rental of* $119,480.05". An examination of the brief will lead to no other conclusion than *that petitioners were the only attorneys who disclosed the impropriety of retaining the Debtor in possession,* and the necessity for the appointment of disinterested trustees.

The Master *did not simply recommend that the Subsidiary Debtor remain in possession, as he now states* (R. I, p. 181). His report, which he *then* filed, shows *differently.* There, he stated (R. I, p. 227) that the Debtor was a substantial creditor of the Subsidiary Debtor and was in turn owned by the Vaness Company, who was, in turn, controlled by the same persons who dominated all of the companies. He concluded:

> "The interests of said Debtor are adverse to the interest of Subsidiary Debtor and that said adverse interests are herein represented by the same persons."

These findings and recommendations were the result of petitioners' efforts, their examination and cross-examination of the witnesses, the evidence they produced, the oral argument presented, and the brief which they filed (R. I, pp. 72-84).

Notwithstanding the introduction of the foregoing the Master did not recommend the appointment of Trustees for the Subsidiary. He found a different remedy—the appointment of Trustees for the "Parent".

The recommendation to appoint the Trustees for the Debtor and "disinterested counsel" in order to sever the adverse interests resulted directly from the petitioners' efforts. These Trustees were appointed as their own counsel. *Their services evidently benefited the estate* as the *Master recommended paying them* $32,500.00 for supervision (R. I, p. 171), $12,500.00 as their own counsel (R. I, p. 172), $25,000.00 as counsel for the Subsidiary Debtor (R. I, p. 173).

Were petitioners not entitled to *any* compensation because the Master adopted a different expedient from that

which was advocated by the petitioners? It was their position that the appointment of Trustees *to merely hold the shares of the holding company in their portfolio did not cure the adverse position of the dominant officers who controlled the management company, the Subsidiary, which was in actual charge of operations.* They, therefore, filed in good faith, objections to that part of the report (R. I, pp. 85-87). *The court's attention was called to the mismanagement of the property by the officers and directors of the Subsidiary Debtor.* The objections referred to the testimony. It summarized the evidence and after pointing out these facts it was urged (R. I, p. 86):

> "The finding and recommendation of the Master that an order to sever the adverse interests of the parties it was necessary to appoint a Trustee of the Debtor and to be represented by independent counsel *called for a similar finding and recommendation to appoint a Trustee for the Subsidiary Debtor for the reason that all of the tangible property is in the possession and control of the Subsidiary Debtor."*

In his report recommending the appointment of the Trustees for the "Parent", the Master was "careful" to state that his report was not predicated upon *"the slightest shadow of a doubt as to the good faith and intentions of such officers"* (R. I, p. 227), notwithstanding the transcript of the testimony and the Brief of Appellants which he returned therewith. A specific objection was filed in court to that statement (R. I, p. 87) supported by a brief (R. I, p. 88). *This statement of the Master has since been proven erroneous.* The court found *fraud* to exist relating to the $5,000,000.00 transaction when it reversed the same Master and the Court (*Gochenour* v. *J. P. Morgan, et al.*, 111 F. (2) 378). *The fraud was committed by the same persons whom the Master found to have*

acted in good faith. The fraud in the formation of the Midamerica and in the purchase of the assets in the Morgan sale (*Re Van Sweringen,* 119 F. (2) p. 213) *was also committed by the same persons,* against whom the Master said there was not "the slightest shadow of a doubt" as to their "good faith". See also *Gochenour* v. *Cleveland Terminal Bldg. Co.,* 118 F. (2d) 89.

The District Court did *not* brush aside these objections summarily. It gave consideration to the objections and to the brief (R. I, p. 229). It held the matter under *advisement* until May 21, 1937, and its memorandum opinion indicates (R. I, p. 230) that *it gave some thought to these objections* and that *its finding did not coincide with the Master's views* that the dominant officers of the Vaness, the Van Sweringen Corporation and the Cleveland Terminals Building Corporation always acted in good faith and that there was not the "slightest shadow of a doubt" as to their actions. The District Court stated in its memorandum of February 5, 1937 (R. I, p. 229):

> "That *inter-company relationship* is of such character as to make certain of the interests between the two Debtors *adverse to one another,* and that *orderly administration requires the appointment of officers by the court to control and represent the interest of the principal Debtor,* both in respect to its liability to the parent company and *its claims against the Subsidiary Debtor.*" (Emphasis ours.)

The court did *not* overrule the objections to the Report at that time but, on the contrary, *it reserved its ruling for further consideration* when it appointed Frederick L. Leckie and Joseph G. Fogg, as Trustees for the Parent with power to act as their own counsel. Even in overruling the objections on May 21, 1937, *it stated that it was "without prejudice"* to further consideration by the

Special Master, "and if and when some further showing was made that would justify the appointment of a Trustee or Trustees for the Subsidiary Debtor" (R. I, p. 230). *Such a further showing was made by the petitioners,* as will now be demonstrated.

Notwithstanding the fact that the court appointed Messrs. Leckie and Fogg as Trustees of the Debtor in order to *sever the adverse interests* by its order of February 7, 1937, *the Debtor and Subsidiary Debtor adopted a joint reorganization plan dated May* 18, 1937, which was grossly unfair and inequitable. It should be noted that while the plan mentions that Messrs. Leckie and Fogg were appointed as Trustees for the Van Sweringen Corporation (R. I, p. 256) *their names do not appear as the persons who sponsored and adopted the plan.* The name of Barrett, as Vice President of the Van Sweringen Corporation the Parent, and of Bradley, as President of the Cleveland Terminals Building Company, the Subsidiary, are signed thereto (R. I, p. 258). *Where were the Trustees?* If the Trustees actually *superseded the dominant officers* and the adverse interest was *severed* it is not reflected in the Plan of May 18, 1937, which was issued *three months* after their appointment. *The Master permitted the mailing of the Plan and the solicitation of the consents thereto* (R. 269).* If the Master was able

* Under Section 77B or Chapter X a Special Master must report to the Court, which is to enter orders. (*In Re A. B. Co.,* 15 Fed. Supp. 152; *Garden City Canning Co.* v. *Addy,* 116 F. (2d) 137, 141; *In re Mofflein Chemical Corp.,* 123 F. (2d) 311, 313.) Here, the Master entered orders (R. 71, 100, 102, 218, 231, 243, 248, 269). He even entered an order on September 29, 1942, appointing "Special Counsel" on the appeal before the Circuit Court of Appeals (R. 310).

to learn all of the facts pertaining to the adverse interests of the parties, if he knew all of the principles of law involved, the authorities sustaining such principles, and did not need any aid of counsel, *he should have then known that this Plan was unfair,* and it was improper for the dominant officers whom he claimed to have removed by the appointment of Trustees to act on behalf of the "Parent". The contrary thereto appears from the fact that he ordered (R. I, p. 269) the printing of the Plan and permitted the solicitation of acceptances. He evidently did not know that the Plan was unfair as he permitted the two corporations to use the corporate funds in printing the documents and in soliciting the consents. That it was *not* obvious that the Plan was unfair also appears from the fact that *no steps were taken by the Trustees to prevent the plan.* Evidently they thought it was a fair Plan.

When this unfair Plan was permitted to be mailed out to all of the creditors in excess of 3,000 in number and without protest by the Trustees, and the solicitations to the Plan were sought, petitioners filed objections (R. I, p. 272) and informed all creditors of their position (R. I, pp. 153, 154). On the hearing pertaining to such Plan held before the Master on August 6, 1937, they filed amended objections (R. I, p. 94) pointing out the unfairness of this Plan, and further urged that a Trustee or Trustees should be appointed for the Cleveland Terminals Building Company "Subsidiary" with instructions to demand and procure an accounting from the corporate officers and directors and to take appropriate action against them for the protection of the rights of the bondholders of the Cleveland Terminals Building Company. We will discuss later the unfairness of the Plan which was sought to be put over on the investors. *It is sufficient*

here to point out that the remedy of the appointment of the Trustees for the Debtor did not work; that the adverse interest was not severed; that their appointment was forgotten when the Master permitted the mailing of the joint plan of the Debtor and its Subsidiary.

After this meeting of the creditors on August 6, 1937, when petitioners obtained leave from the Master to file objections to the various claims, the Master, of his own accord, saw fit to enter an order on August 10, 1937, to appoint "special counsel" to deal with *some* of the claims (R. 231). He based the order on the adverse interest of the parties. *Such adverse interest did not suddenly arise on August* 10, 1937. These claims were on file for many months.* *No one sought to disturb them.* It appears from the record that special counsel failed even to contest some of the claims, and their contest consisted of the adoption of the objections filed by the petitioners after all facts were disclosed to them by the statement of facts, which was made available to them and which appears among the 44 exhibits in the bound volume as Exhibit 7.

The Master says (R. I, p. 180) that on January 26, 1938, he recommended the appointment of Trustees for the Subsidiary Debtor, not because of anything that was urged by the appellants, but *because Bradley resigned as the principal officer.* Bradley's resignation should not have been the cause for the appointment of Trustees

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* The claim of the Terminal Building Company was filed January 14, 1937 (R. I, p. 16). Another claim of $1,551,041.66 was filed January 14, 1937, to which appellants filed objections (R. I, p. 174). Special counsel who were appointed by the Master to contest this claim (R. I, p. 231) filed no objections but later asked for compensation (R. I, p. 174).

for the Subsidiary Debtor, for, by his resignation, the *adverse* interest was *diminished.* His resignation should not have suddenly caused the Master to recommend the appointment of Trustees for the Subsidiary Debtor. *It was because of the unfair plan which was sought to be put over and the criticism of the plan* in petitioners' objections which were made available to *all* creditors (R. I, p. 320), which was brought home to the Master. *Because of the demand for action against Bradley* and others, *they and their joint counsel stepped aside and resigned.* It was because of the intervening petition which petitioners filed with the Master on March 13, 1937, urging the appointment of Trustees for the Subsidiary Debtor (R. I, p. 239) and the amended petition of March 20, 1937 (R. I, p. 239), urging an accounting from the officers of the "Parent" and "Subsidiary" (which he held under advisement until June 4, 1937) and which report was not filed until 1941, that Bradley decided to resign.* It was because of the matters brought out by petitioners that the Master decided that he could hold out no longer and had to make the recommendation.

The court, however, *did not follow the Master's recommendation.* It added to the duties of Fogg and Leckie as Trustees and counsel for the Debtor, the further duty of "supervisors" for the Subsidiary Debtor (R. I, p. 236). This, the court said was not done because of the recommendation of the Master, but of the *court's "own motion"* (R. I, p. 235). It was evidently the result of the constant, persistent, continuous urging on the part of the petitioners which had become indelibly *imprinted in the mind of the court relating to the adverse interests*

* Bradley also withdrew a claim of $1,551,041.66 after petitioners filed objections to the claim (R. I, p. 174).

of the directors and officers and their mismanagement; the 1937 *unfair reorganization plan,* the objections thereto, and the *insistence of the appellants* to appoint trustees, and the activities of the petitioners in commencing action against the officers and directors of the Subsidiary Debtor, which moved the court to appoint "supervisors".*

The order of the District Court of February 1, 1938, clearly shows that the court *did not appoint the supervisors because of the Master's report* but *because of the persistence of the petitioners.* Its order states (R. I, p. 235) that "independently of said report" and *"for a reconsideration of the court's own motion"* of the "questions presented *at the time the petition* was filed herein as to whether a temporary Trustee or Trustees should be appointed, or whether the Subsidiary Debtor should be left in possession." It is apparent that the court's action was not based on the Master's report.

We have conclusively demonstrated by the record and exhibits that the Master's statement that petitioners "in no way" participated in the appointment of the Trustees for the Debtor and independent counsel and in the appointment of the "supervisors" for the Subsidiary Debtor *is contrary to the record* and is contrary to the facts.

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* It should be noted that in its order the court stated that no one present before the court urged the appointment of Trustees (R. 236). It should be also noted that petitioners who insisted throughout the case for the appointment of the Trustees were excluded from the notice for the hearing (R. I, p. 235). The Master also failed to give notice to them (R. I, p. 233).

The Special Master's statement that petitioners made no contribution to the administration of the estate is also contradicted by the other reports which *he* filed. In one of these reports he referred to an action which petitioners commenced concerning the Higbee matter and that the action was no longer necessary because on or about December 15, 1938, counsel for the Subsidiary Debtor filed a proof of claim in the Higbee Reorganization (R. I, p. 252). The Higbee matter was called to his attention in November, 1936, and petitioners *sought greater relief* than the mere filing of a claim (R. I, pp. 73, 79). In the other report (R. I, p. 255) he referred to the relief sought by the petitioners pertaining to the Country Club's demand note of $1,112,000.00 (R. I, pp. 75, 79) that *"the matters set forth in subdivision "b" were examined into and resulted in realization of* $240,000.00 *for the benefit of the estate of the Subsidiary Debtor."** In that report he also refers to *another cause of action* which petitioners sponsored and the Master says (R. 255):

> "By order heretofore entered herein, the prosecution of any rights in favor of the Cleveland Terminals Building Company, as against the Higbee Company, were given consideration, and special counsel was appointed in 1938 to protect the interest of the Subsidiary Debtor in connection therewith."

It is true that almost in each instance after the petitioners brought out the facts and asked for the relief "special counsel" were designated. When they obtained leave to file objections to claims on August 6, 1937 (R. 19), the Master appointed special counsel (R. I, p. 231) and later stayed the proceedings on petitioner's objections (R. I, p. 100).

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* The estate lost the difference between the $240,000.00 and the $1,112,000.00. See Brief in Support of Motion to Remove Debtor From Possession (R. I, p. 79).

A glance at the transcript of the hearing had November 13, 1936, long before the Adams application, will disclose that *appellants had brought out the facts relating to the Chamber of Commerce lease* and complained of the fact that the Chamber of Commerce was allowed to remain in possession at a loss to the estate ranging between $12,000.00 to $25,000.00 per year. *Petitioners then asked for the cancellation of the lease* which could have been cancelled by the Indenture Trustee if it had performed its duty or by a Trustee of the Subsidiary if a Trustee had been appointed (R. I, p. 75). The Master described it in his report of December 31, 1936 (R. I, p. 225), and conceded in that report that the Lease was one of the issues at that hearing. The Master says that petitioners had notice that the Adams Group *preceded* them by five days with an application. He refers to Exhibit 119 which is his report of June 4, 1937, which he did not file until 1941. The record *affirmatively* shows that *no notice was given* to petitioners (R. I, p. 238). We have already shown that the Gochenour intervening petition was verified February 24, 1937 (R. 239), which was prior to the petition of the Adams Group.

The question whether the cancellation of the lease resulted from petitioners' efforts or from the efforts of the Adams Group was a *factual* question. The Master had no right to "travel" *outside* of the record. Judicial notice "supplies facts" only when a *factual issue is raised at the hearing.* In the absence of such an issue by proper pleadings *there could be no judicial notice* as to what the Adams Group did. (*Missouri Utilities Co.* v. *City of California,* 14 F. Supp. 613.)

In discussing the point that petitioners were entitled to compensation for results obtained in procuring the segregation of the funds belonging to the mortgaged premises under the heading:

"3. Funds Belonging to the Tower Building Were Segregated",

the Master stated that this was "untrue". His mental attitude may be best illustrated by the fact that no such language was used when he found an incorrect statement of other counsel, particularly "special counsel". There he was polite, using the term (R. I, p. 17) "inadvertence". When petitioners applied for the segregation (R. I, ll. 243, 246) the Master resorted to every reason to deny the segregation, but when a similar application was thereafter made by the Mortgage Trustee (R. I, p. 247) all of his reasons vanished, the segregation was allowed and its counsel was rewarded with $5,000.00 for such efforts. The Master conceded (R. p. 183) that petitioners were first to seek relief. They, who initiated the proceedings to obtain the segregation which was followed by the Mortgage Trustee, were certainly entitled to some compensation.

In discussing petitioners' claim for compensation for their efforts to obtain the cancellation of the Chamber of Commerce lease under the heading:

"4. The Chamber of Commerce Lease of Over 10% of the Entire Space of the Entire Building Was Cancelled,"

the Master again used the words "not true" (R. I, p. 186). He gave the *sole* credit to counsel for the Adams Group and rewarded him $15,000.00 because he filed the application to cancel the lease on March 8, 1937, allegedly prior to the filing of the application by petitioners. The record shows that the petition was verified February 4, 1937 (R. 239), which antedated the filing date by the Adams Group. The Master also found another reason for the denial of any compensation, because he said that the lease was not canceled, but the

option for renewal was not exercised. It is significant that this was no obstacle for the reward to the Adams Group for such results (R. I, p. 178). That petitioners were first to urge the cancellation of this lease appears from the transcript of the evidence of November 13, 1936 (R. I, p. 75). It was discussed in the Master's report of December 31, 1936 (R. I, p. 235). It was urged in the brief which was filed with the Master and in the brief which was filed with the court. The statement of the Master that petitioners had notice of the application by the Adams Group five days before they filed their petition, is refuted by his own record (R. I, p. 238).

In analyzing and discussing the request for compensation for services rendered in procuring the abandonment of the 1937 and 1938 Plans under the heading:

"5. The Unfair Plans of Debtor and Subsidiary Debtor of 1937 and 1938 Were Rejected,"

the Master says (R. I, p. 187) that petitioners were not entitled to any compensation for rejecting the Debtor's plan, because their clients were not its creditors. He concedes that petitioners "strenuously opposed the 1937 Plan of subsidiary Debtor". This Plan was the *joint* plan of the Debtor and its Subsidiary, so that whether or not petitioners' clients were creditors of the Debtor or its Subsidiary, was of no consequence.

He also minimized the services performed in objecting to the Plan of the Subsidiary because the Committees also objected. The record shows that petitioners filed extensive objections to the Plan (R. I, pp. 272-275). None of the committees were in *existence* at that date, and they were formed as a result of these objections. They obtained the information from petitioners as a result of many conferences (R. I, pp. 148, 153, 154, 166, 320).

The statement of the Dunham Committee shows (R. I, p. 166) that its chairman conferred with petitioners after he received their objections (R. 320). They had several conferences with petitioners, which *resulted in the formation of the Committee,* and they considered "all material obtained" from "Gochenour objections". The Master conceded that this Committee performed valuable services when he allowed its counsel $15,000.00.

To deprive petitioners of the fruits of their labor, he credited the Dunham Committee with the rejection of the 1937 Plan. The objections to his report specifically raised this point (R. I, p. 198). Had the court granted the petitioners the opportunity to be "heard" under Rule 53 (e) 2 they would have produced the statement of this Committee in support of the objections, and the result might have been different. Had an opportunity been afforded, petitioners would have presented the communication of the Adams Group (R. I, pp. 318-320) which would have thrown a different light on the subject-matter, and the court might have reached a different conclusion. In the communication of the Adams Group sponsoring the 1937 Plan, they stated that "after mature deliberation" and in view of the selfish interests of a few bondholders "the interest of all bondholders can best be served by accepting the Plan of Reorganization at this time". This plan was later conceded by the Master to have been unfair; yet, counsel for this group was allowed $15,000.00, while petitioners were not allowed anything for the services rendered.

The entire theory of the Master that petitioners were not entitled to compensation for opposing the Debtor's plan because they were not its creditors, is *fallacious* for the reason that this was a *joint* plan of the Debtor and

its Subsidiary (R. I, p. 274). Petitioners, as creditors of the Subsidiary, were vitally interested in the Debtor's plan because under that plan property of the Subsidiary Debtor was to be released from the lien securing their debt and transferred to the creditors of the Debtor. The plan contemplated releasing the entire obligation of the $6,000,000.00 in bonds plus accrued interest in exchange for preferred stock in the Tower Building, which was later appraised by the same Special Master at $3,000,000.00. They were to receive the preferred stock in the corporation valued at $3,000,000.00 and they were to release *all of their claims for the balance of the debt of approximately* $4,600,000.00. All of the other assets of the Subsidiary were to be given to general creditors, whose claims aggregated approximately $85,000,000.00. The Gochenour Group, as leasehold bond owners, were interested in the rejection of that *joint* plan *because the leasehold bond owners were entitled to be general creditors of the Subsidiary to the extent of* $4,600,000.00 and to participate with the other general creditors. They were also entitled to participate in the rejection of many of the claims as they did, which reduced the claims to approximately $55,000,000.00.

The plan which the Master permitted to be submitted to the investors and to solicit consents thereto was *a very complicated one.* The Adams Group claimed a monopoly for the understanding of the plan and inferred that the Gochenour Group "only superficially examined the plan" and they *urged* the acceptance of the plan. If the plan was so plainly unfair the Master would not have permitted it to go out. He evidently must have thought it to be fair. Petitioners' objections *analyzed* the plan in plain words (R. I, pp. 272, 320) and *because of such objections the consents did not come forth.*

Contributions to Reorganization: In discussing the services performed by petitioners in obtaining the approval of the final Plan under the point:

"6. The Fair and Equitable Plan of 1940 Was Adopted,"

the Master disposes of the whole subject-matter by the single sentence:

> "The record shows no contribution offered by the petitioners to the Plan of Reorganization as Adopted."

The Master was required to make findings and not conclusions (*Hofer* v. *Corona Products, Inc.*, 121 F. (2d) 612).

While under Rule 52 (a) the court would be authorized to adopt the findings of the Master, it could not adopt this statement which was simply a conclusion. Under such circumstances the District Court was required to make its own finding under Rule 52 (a). *Kelly* v. *Drainage District*, 63 S. Ct. 1141, 1144. The Circuit Court of Appeals completely erred when it applied in one breath Rules 52 and 53 on the point that it would not disturb the concurrent findings unless "clearly erroneous", and at the same time *it failed to apply* the Rule which required "findings" and not "conclusions". Petitioners specifically urged this objection (R. I, p. 198). No opportunity was afforded them by the court to produce the evidence to refute the conclusion. Had the court afforded them the opportunity they would have presented to it the proposed amendments to the Plan (R. I, pp. 98, 272). In these proposed amendments, p,etitioners suggested the following:

(a) Appraisal should be made by direction and under the supervision of the court of all of the assets and property of the Debtor and Subsidiary Debtor including the leasehold estate of the Terminal Tower Building.

(b) The present first mortgage leasehold bonds on the Tower Building should be reduced to 50% of the appraised valuation of the Tower Building and for the balance of the 50% there should be delivered to the bondholders the securities to be issued under the plan and the bondholders should participate as general creditors with other creditors of the Subsidiary to the extent of the difference between the valuation of the leasehold property and the amount of their general claim.

(c) That the charter and by-laws of the reorganized company should be submitted to the court for its approval, including the election of its directors.

(d) That a Trustee or Trustees should be appointed for the Subsidiary Debtor with instructions to demand an accounting of all officers and directors and to take appropriate actions against all persons, firms or corporations for the protection of the rights of the bondholders.

The insistence on the appraisal was repeated on April 23, 1938, when the 1938 plan was submitted by the Debtor, the Subsidiary Debtor, the "supervisors" and the two committees (R. I, p. 12). It is significant to note that while the 1938 plan which the Master found on May 20, 1940, to be unfair (R. I, p. 280) was sponsored by *all* of the parties who recommended it as fair and urged the filing of the acceptances (R. I, p. 278), *the Gochenour Group did not join in that communication.* The Gochenour Group *did however join in the communication for the acceptance of the final plan which was* approved by the court as fair and equitable (R. I, pp. 316-318). *This final plan of* 1940 (R. I, p. 279) *was based upon the original suggestions of the appellants to appraise the leasehold estate, to give to the bondholders security to the extent of the appraised value and to give them a general claim for the remainder of the debt.* The Special Master ordered an appraisal and the leasehold

estate was appraised on August 13, 1940, at $3,000,000 (R. I, p. 279), and he allowed to the bondholders a *general claim* in the amount of $4,685,256.02. It is evident that *petitioners' amendments were adopted and incorporated in the final plan* giving new securities to the bondholders to the extent of $3,000,000 and a general claim for $4,685,256.02 on the other property with other general creditors.

Nowhere in this record is there any evidence to support the Master's single sentence and nowhere is there any evidence in the record to contradict the foregoing evidence.

Elimination of Claims: In discussing the compensation for services performed in eliminating claims under the heading:

> **"7. Two claims aggregating $10,325,146 were eliminated,"**

the Master recommended the denial of any compensation on the ground (R. I, p. 189), that this was accomplished by J. P. Morgan & Co., and not by petitioners. He stated that petitioners objected to both, principal and interest, and Morgan only objected to the interest, and that petitioners' objections were overruled while Morgan's objections were sustained, and that petitioners' contribution "was of negligible value."

The record shows that petitioners filed objections to the Parent's claim of $37,357,755.44 on August 17, 1937. The first objection went to the *entire* claim (R. I, pp. 107-109) and the third objection raised the point that the Parent was not entitled to collect *any of the interest* which was included in that claim. After trying the case

before the Master by the introduction of evidence, petitioners filed a brief on April 12, 1938, consisting of 30 pages (R. 111). Point V of the brief was confined to the discussion that "the course of conduct of the parties precludes all right to recover interest" (R. I, p. 113). The "statement of facts" (R. I, p. 111) discusses the evidence which appellants submitted relating to the *interest. In the face of this record* the Master's statement that petitioners *did not offer any evidence as to the interest* and that their services with reference thereto was of *"negligible value"* is *unexplainable.* The interest proposition was discussed in the brief (R. I, p. 113). Messrs. Fogg and Leckie sought to establish the claim for interest in their brief and appellants filed a reply brief on May 19, 1938, consisting of 20 pages (R. I, p. 13). Point V of the reply brief *was devoted to a discussion of the interest* (R. I, p. 114). In rendering the report on this claim the Master did *not overrule the objections of the appellants on behalf of "Gochenour, et al.",* but, *on the contrary, he sustained their objections* as well as the objections of Morgan as to the interest (R. I, p. 301). *The statement of the Master that he overruled all of the objections of "Gochenour, et al." is simply not borne out by the record.*

The further statement (R. I, p. 189) that the disallowance of the Parent's claim against the Subsidiary for interest was the result of the attorneys for Morgan & Company and not because of any evidence or contribution of the appellants *is contradicted by his own report which he filed in court when he recommended the disallowance of the claim for interest.* In that report *he* referred to petitioners' evidence (R. I, p. 295). *He relied on the evidence of the petitioners* (R. 295, 297), on the point that there was to be no interest charge concerning the

open account. *He expressly referred to the evidence produced by the appellants on direct as well as on cross-examination.* His report concluded with the following (R. I, p. 301):

> "The objections of J. P. Morgan & Company *and A. B. Gochenour to the allowance of interest* upon the claim of Van Sweringen Corporation vs. The Cleveland Terminals Building Company *are sustained.* The claim of Van Sweringen Corporation for interest herein filed for the allowance in the assets of The Cleveland Terminals Building Company in the sum of $10,272,146.67 is disallowed."

This is what the Master said on November 14, 1939, and refutes his statement in this report (R. I, p. 189) that:

> "Hearings upon the matter of the objections to the allowance of interest were conducted *entirely* by counsel for J. P. Morgan & Company."

His statement (R. I, p. 189) that he only sustained the *objections of J. P. Morgan* to the allowance of interest, *which is contrary to his own report,* which "sustained" the objections of "Gochenour, *et al.*" *cannot be reconciled with the record.*

It is clearly obvious the statement was made solely for the purpose of depriving Petitioners of their fees in this regard.

If the opportunity to present the argument in court on the objections were afforded, we believe that the Court would not have sustained the Master as the order of the Court in disallowing the interest claim *expressly stated that it was entered upon the objections of J. P. Morgan & Company as well as upon the objections of "A. B. Gochenour, et al."* (R. I, pp. 303-304).

Petitioners were also entitled to compensation for their services relating to the opposition of the entire claim of the Parent against its wholly owned Subsidiary, even though they were only successful in eliminating the claim for interest. There was no Trustee appointed for the Subsidiary Debtor and the Parent's interests were adverse to the interest of that of the creditors. Because of its adverse interests, the Subsidiary Debtor filed no objections to the claim of the Parent. "Special counsel" failed to file any objections. The burden seemed to have been cast upon petitioners as creditors to contest the entire claim in the absence of a trustee and as a matter of fact the creditors' committees seemed to expect appellants to file objections and to follow through on behalf of all of the creditors.* A reference to the objections (R. I, pp. 107-109) and to the Brief (R. I, p. 111) and Reply Brief (R. I, p. 113) will disclose that *petitioners made a bona fide effort to eliminate the entire claim in excess of* $37,000,000. We are confident that had the *"Deep Rock"* case been decided earlier (*Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307), *the result would have been different* and the entire claim would have been eliminated. A mere glance at our brief (R. I, p. 111) and our reply brief (R. I, p. 113) and the Master's report in considering its issues (R. I, pp. 286-295) will be sufficient to convince this Court that *we were right in our contention that the entire claim should have been eliminated.* If an independent, impartial trustee had been appointed by the Court as was persistently and insistently requested by petitioners who would have contested this issue and who would have had funds available from the estate to carry on the contest on an appeal, the estate herein would have materially benefited by the

*None of the Committees participated in the hearings on the objections to claims.

disallowance of the entire claim. No individual creditor or even group of creditors are in position to appeal in each instance from erroneous rulings of a Master.

After the Master disallowed the claim for $10,172,140 Messrs. Leckie and Fogg, as Trustees for the Parent, filed objections to the report. Petitioners filed their brief on May 12, 1939, seeking to *uphold the Special Master* (R. 114-115). The Court overruled the objection and sustained the Master (R. I, p. 303). The statement of the Special Master that any contribution of the petitioners to the disallowance of the claims "was of negligible value" is, therefore, *not borne out by the record.*

"Special Counsel" appointed by the Court were attempting to obtain the allowance of fees for the elimination of this claim by their application No. 21. They sought $33,000 for certain services, and the Master allowed them $27,500. The Master, who, at every occasion, chose to use the word "untrue" when it came to petitioners' statement, he said (R. 177): "Probably through inadvertence counsel erroneously states" that they "objected to the allowance of interest upon the claim of the Van Sweringen Corporation" and "prosecuted said objections". *He says that the facts were that Morgan and Gochenour filed objections to principal and interest,* which objections were sustained and that Special Counsel "did not assist in any manner in the determination of said issue before the Special Master and did not participate in the hearings held before the Special Master."

The uncontradicted record is that petitioners objected to the interest; *they tried the case; filed briefs before the Master and filed a brief in court sustaining the Master's report.* The Court acted on the brief of petitioners as well as on the brief of Morgan. It entered the order sustaining the *joint* objections.

Petitioners also performed similar services in the elimination of a claim for interest in excess of $53,000. Here again the Master gave the entire credit to counsel for J. P. Morgan and stated that he overruled the objections of petitioners (R. I, p. 189). The record contradicts the Master's statement as he sustained the objections of A. B. Gochenour, *et al.* as well as the objections of J. P. Morgan & Company (R. I, p. 308) and the Court entered a similar order sustaining the *joint* objections (R. 309). When special counsel for the Subsidiary Debtor asked for compensation for the elimination of this claim the Master in recommending the denial of said compensation pointed out that *the Gochenour Group filed objections on August* 27, 1937, and that J. P. Morgan & Company filed objections *on March* 29, 1938 (R. 175), one day prior to the date *when the Gochenour objections were set for trial.* The Master stated in his report concerning this claim (R. I, p. 308):

> "Because of the close relationship of the various corporations involved in the transactions and in the interest of a close scrutiny in the details (deals) between the companies, the Special Master permitted Objector Gochenour upon his application to examine the books of CTB as to the transactions giving rise to this and other claims filed against CTB herein by former closely related companies."

Counsel for Gochenour did examine these books and records and prepared for the trial of the case (R. 33). *They performed their services in prosecuting the objections to the claim which included both principal and interest without anticipating that J. P. Morgan & Company would file objections and that the Master would set these objections one day ahead of the trial on the objections of Gochenour.* Now the Master says that inasmuch as Morgan tried the case a day earlier the petitioners are not entitled to compensation for their services.

We have already shown above that "special counsel" for the Subsidiary Debtor asked for compensation for the elimination of this claim and in denying such compensation the Master pointed out that A. B. Gochenour, *et al.* filed their objections in August, 1937 (R. 175) and that Morgan & Company filed objections in March, 1938, and that "special counsel" did not assist in any way in the hearings upon the objections. After the trial of the case petitioners filed an extensive brief with the Master, the outline of which appears in the printed record (R. I, p. 104), but the full brief appears in the bound volume. Point IV in that outline deals with the objections to interest. After the filing of this brief the claimant filed an extensive brief supporting the claim, and appellants filed a reply brief, an outline of which is in the printed record (R. I, p. 105) but the entire brief appears in the bound volume. When counsel for the claimant raised the point that "special counsel" for the Subsidiary Debtor did not oppose the claimant as to the principal a further memorandum brief was filed (R. p. 106). If "special counsel" had opposed the claim to the principal and perfected an appeal from an adverse ruling, we are certain that the claim would have been eliminated under the principle decided in the *Deep Rock* case. (*Taylor* v. *Standard Gas & Electric Co.,* 306 U. S. 307, *supra.*)

IV.

The Affirmance of the Denial of the Reimbursement of a Part of the Expenses Cannot Be Sustained on Any Theory.

Petitioners asked for reimbursement of expenses aggregating $6,163.41, which included $1,797.50 for their accountants (R. I, p. 170). The Securities and Exchange Commission recommended the allowance of $5,339.51 (R.

II, p. 102). The Master only allowed $2,500.00, giving as his reason and of necessity some reason was required to be given by him that in a prior appeal taken by these petitioners in their objections to the Morgan claim (*Gochenour* v. *J. P. Morgan,* 111 F. (2d) 378, the Court of Appeals only allowed the reimbursement of 20% of the expenses. The application for the allowance of costs on appeal has no bearing on the issue of reimbursement for expenses in the reorganization plans. The issue on the allowance of costs on an appeal is an issue between an appellant and an appellee, while the issue for the reimbursement of expenses in reorganization is between the creditors and the estate. This court, in passing on the costs on an appeal, expressly held that this shall not prejudice the rights of the parties to seek reimbursement from the estate in the reorganization proceedings. (*Ecker* v. *Western Pacific R. R. Co.,* 318 U. S. 448, 510, 63 S. Ct. 692, 724).

The theory of the District Court which was affirmed by the Court of Appeals, that an appellant in a Reorganization proceeding who is compelled to appeal and only succeeds to recover 20% of the amount which he sought to recover, is only entitled to the reimbursement of the cost on appeal, to the extent of 20%, as was done in the previous appeal by these petitioners from the Morgan claim (*Gochenour* v. *Morgan & Co.,* 111 F. (2d) 378), and to apply this doctrine (R. II, p. 64) to deny the reimbursement of expenses to creditors on the theory that on the former appeal the Court of Appeals only allowed 20% of the reimbursement, is *contrary to the policy of Congress,* which is "paramount" to *encourage* "responsible creditor and Class participation in Reorganization" (*Re New York, N. H. R. Co.,* 46 F. Supp. 236, 240).

CONCLUSION.

We have shown above that the Master was biased; that the District Court did not afford the petitioners their "day in court," and that the Court of Appeals improperly construed and applied Rules 52 and 53. Therefore the petition for the writ of certiorari should be allowed.

Respectfully submitted,

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Counsel for Petitioners.

(2)

FILED

NOV 1 1943

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 415.

In the Matter of

VAN SWERINGEN CORPORATION, Debtor,

and

THE CLEVELAND TERMINALS BUILDING COMPANY,
Subsidiary Debtor.

MEYER ABRAMS, HARRY J. MYERSON
and FANNIE B. STERN,
Executrix of the Estate of Joseph L. Stern, Deceased,
Petitioners,

vs.

THE CLEVELAND TERMINALS BUILDING COMPANY,
Respondent.

On Petition for Writ of Certiorari
To the United States Circuit Court of Appeals,
For the Sixth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION.

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Respondent.

On Petition for Writ of Certiorari
To the United States Circuit Court of Appeals,
For the Sixth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION.

QUESTION PRESENTED.

The single substantial issue before the Special Master and the District Court was

> "How much compensation should be allowed to petitioners?"

This was a question of fact—a problem of the evaluation of services rendered or claimed to have been rendered.

The issue in the Circuit Court of Appeals was, and the issue here is

> "Should this Court disturb the concurrent findings made below?"

I. OPINIONS OF THE COURTS BELOW.

A. THE UNITED STATES CIRCUIT COURT OF APPEALS.

The one-page opinion of the United States Circuit Court of Appeals is reported at 136 Fed. (2nd) 537. It constitutes the best brief that can be written on behalf of respondent and accordingly we quote it here in full:

> "In the proceedings for corporate reorganization involved herein, forty applications for compensation and expense allowance were made in sums totalling $803,944.48 for compensation and $41,929.99 for expense allowance. The Special Master reported his recommendation of allowance to the various applicants of the total sum of $373,178.53 as compensation and $36,014.74 as expense reimbursement.
>
> "The District Judge overruled all objections and exceptions to the report of the Special Master, confirmed the report, and ordered the allowance of compensation and expenses as recommended by the Master.
>
> "The appellant attorneys, Abrams, Myerson and Stern, have appealed from the order of the District Court. Their claim was for $172,200 as compensation and $6,163.41 as expenses.
>
> "The Master recommended, and the District Judge allowed them $18,000 as fees and $2,500 for expenses. The intervening Securities and Exchange Commission had recommended the allowance to the appellant attorneys of $18,000 as compensation and $5,339.51 for expenses.
>
> "(1) It is settled law, repeatedly asserted in this circuit, that the concurrent findings of the District Judge and the Master will not be set aside, unless plainly erroneous. *In re Allied Products Co. (Continental Casualty Company v. Harold H. Barnett, Trustee in Bankruptcy)*, 6 Cir., 134 F. 2d 725, decided April 8, 1943; *Kowalsky v. American Employers Ins. Co.*, 6 Cir., 90 F. 2d 476, 480.
>
> "(2) Upon consideration of the record, briefs, and oral argument, no error of law affecting the determination of this controversy on appeal has been found,

and there is abundant evidence to support the concurrent findings of the Master and the District Judge with respect to the fee-compensation and expense allowance to appellants.

"The judgment of the District Court is affirmed."

This judgment refusing to disturb the findings of fact made below was well justified; for, as we shall show hereinafter, every finding in the trial court was amply supported by adequate evidence, so that no ground whatever exists for a disturbance of the findings made.

B. THE UNITED STATES DISTRICT COURT.

The District Court's opinion is not reported, but it appears in the printed record, Volume 1, pages 205 to 207 (not page 705 as is stated at page 8 of petitioner's brief).

II. COMMENTS ON STATEMENT OF FACTS.

According to petitioners, they have been the victims of a malignant combination of a "biased" Special Master, of a District Judge who "did not examine the evidence," and of a Circuit Court of Appeals which ignored its "duty." ("Everybody's out of step except my Michael.") The petitioners' brief is so thoroughly interlarded with charges of this kind that to relate the details of the facts covering each and every such item of indictment so as to show the distortions indulged in by petitioners would require a brief nearly as large as the printed record, and far beyond what good practice dictates in opposing petitions for certiorari. Accordingly we shall confine this brief to showing, as succinctly as possible, that every one of these findings of fact was amply supported by adequate evidence.

A. THE SPECIAL MASTER'S FINDINGS.

Petitioners say that the petition for the allowance of compensation was divided into two parts (Brief, p. 9), namely,

(a) services relating to administrative matters, interrelationship of parent and subsidiary and their dominant officers, segregation of funds, and reorganization plans, and

(b) services concerning elimination of claims in excess of $19,000,000.,

and that they were allowed $18,000. for services performed under (b), which they desire to have left undisturbed, and that their application for compensation for services under (a) was wholly denied. (Brief, pp. 9-10.) Reference to the record does not sustain this division of services as one which was made by petitioners in their application for fees or by the Special Master or the court in the allowance made.

It is a fact that petitioners set forth as one main heading in the summary of their services given in their application (R. I, 5)

"PLANS OF REORGANIZATION AND MATTERS CONNECTED WITH ADMINISTRATION OF ESTATE"

under which are a number of subheadings, and that later on in their application they set forth another main heading (R. I, 16)

"ELIMINATION OF CLAIMS"

under which are also a number of subheadings.

However, at the hearing before the Special Master, petitioners, in answer to a question from the Special Master, adopted (R. I, 161) the classification set forth in the summary part of their application under the heading "RESULTS ACHIEVED" (R. I, 23); and that classification was used throughout the subsequent proceedings before the Special Master, the proceedings in the District Court, and the proceedings in the Circuit Court of Appeals. It will be used in this brief also.

This classification was adopted, and petitioners' attitude toward the entire record of reorganization was established in the hearing before the Special Master, as appears at R. I, page 161 in the following dialogue:

> "The Special Master: Mr. Abrams, is it fair to state that the items on page 26, the results achieved are all summarized under the heading 'Results achieved' on page 26?
>
> The Witness: Correct.
>
> The Special Master: And you are satisfied that whatever the record of the Special Master and the District Courts show as to the various items represent the true facts in connection therewith?
>
> The Witness: I am." (R. I, 161.)

The prayer of the application was for one lump sum of $172,200. "as reasonable compensation for the services performed by your petitioners for the benefit of the estate of the Subsidiary Debtor, The Cleveland Terminals Building Company" (R. I, 25), with no attempt to allocate the claim or any part of the claim to any particular services performed, unless the discussion in paragraph 8 of the application (R. I, 23 and 24) of the percentage relationship of the total fee claimed to the amount of the claims alleged to have been eliminated is an indication that the petitioners intended to stand on the position that their fee should be based on the value of their services in eliminating claims, with the other work done thrown in for good measure, without any serious claim for separate compensation with reference to such other work.

The Special Master's recommendation with reference to allowance is simply for a lump sum as compensation for all of the services referred to in petitioners' application, which the Master found, as a matter of fact, to have contributed anything of value to the estate. His recommendation reads in full (R. II, p. 65) as follows:

"RECOMMENDATION

Allowance is respectfully recommended as follows:

Compensation	$18,000.00
Expenses	
(Reimbursement re employment of Laubscher and Smith)	$ 500.00
(Reimbursement of petitioners' expenses)	$ 2,000.00
Total	$ 2,500.00

ALLOCATION

General Estate	66⅔ percent
Terminal Tower Lease	33⅓ percent"

B. COMMENTS OF THE SECURITIES AND EXCHANGE COMMISSION OF THE UNITED STATES.

The Commission's comment on the petitioners' application is set forth in full in the Appendix of this brief. This shows a recommended allowance of $6,000. for services in connection with plans of reorganization and administrative matters. (See third paragraph of Comments in Appendix.) The total recommendation is for $18,000. The balance of $12,000. is for services in connection with the elimination of claims. (See fourth paragraph of Comments in Appendix.) It also recommends that the $6,000. be charged against the Terminal Tower Building and funds derived therefrom and that the $12,000. be charged against free funds of the Subsidiary Debtor.

These comments of the Commission were in the Special Master's report "incorporated herein, as though fully rewritten and set forth." (R. II, p. 64.) From the specific findings of the Special Master as discussed below, it is obvious that he reached the same result as did the Commission—that is, an allowance of $6,000. for services in connection with plans, all to be allocated to the Tower, and

a further allowance of $12,000. for services in eliminating claims, to be allocated to the general estate.

C. THE DECISION OF THE DISTRICT COURT.

Judge Jones' opinion is set forth at Record I, pp. 205-207 and his order appears at Record I, pp. 208-213. The order states that the Special Master's Report and the notices given concerning the same "are hereby approved, adopted and confirmed as the notices, findings and orders of this Court." (R. I, 208.)

The last page of the Special Master's report filed May 23, 1942, consisted of a notice that the same "will come on for hearing before the Honorable Judges on Saturday, June 13, 1942, at 10 o'clock A. M., or as soon thereafter as the court may conveniently reach the same." (R. II, 69.) On June 1, 1942 the District Judge entered an order specifying the parties to whom should be given notice of the filing of any exceptions to the report of the Special Master. (R. II, 70.) There followed a paragraph postponing hearings to "a time to be hereinafter fixed by the court and noticed by the clerk to the interested parties." Full opportunity was given for the filing of briefs and reply briefs and extensions of time therefor were freely granted. Petitioners' objections and brief were filed on June 5, 1942, and although the brief requested an oral hearing, it contained no intimation of a desire to offer additional evidence. No proffer of evidence was made by anyone, and after a long interval appeared to indicate that all arguments had been made in writing and that no additional evidence was to be forthcoming, the Court on August 21, 1942, announced its decision. (R. I, 207.)

III. SUMMARY OF ARGUMENT.

To sum up our argument, we point out that the District Court's opinion and journal entry both contradict the petitioners' claim that the District Judge failed to examine the evidence.

As to the merits of petitioners' claims that the allowance made was grossly inadequate, we point out that petitioners filed but one application and their prayer was for one lump sum for all of their services rendered, that the court made but one allowance thereon, that this allowance covered all of the services that the court considered compensable and that included in those compensable services were not only the matters of elimination of claims but also services rendered in connection with the plans and with some parts of the administration of the estate.

The single amount claimed as the value of all of petitioners' services was originally placed by them at the modest sum of $172,200. (R. I, 25.) The District Court's allowance of $18,000 was for *all* services as we have shown, and not merely for eliminating claims, as petitioners now say.

Taking up the services in detail, petitioners' points are answered as follows:

Independent supervision. Petitioners may have been instrumental in obtaining appointment of Trustees for the parent corporation but not for the subsidiary. Such services are not compensable out of the estate of the subsidiary. Supervisors for the subsidiary were appointed later but this was on the Special Master's own motion for the appointment of Trustees for Subsidiary Debtor and not because of anything that petitioners had done. Services under this heading were therefore not compensable.

Salaries reduced. No compensation is now asked here by petitioners, who apparently recognize that this matter

was one definitely cast upon the Court by Section 77B(c) rather than upon counsel.

Sequestration of Tower Funds. Because of the Ohio rule (*Hutchinson vs. Straub,* 64 O. S. 413) that the institution of the proceeding itself works a segregation, services in this category were not compensable. The net result of all the agitation about sequestration was to remove from the already segregated funds $81,451.77 which had accumulated prior to the commencement of the proceeding.

Chamber of Commerce Lease. Actually this lease expired by lapse of the stated term. No benefits were derived from the complaints about it.

1937 Plan Rejected. Due credit for this rejection must be given to three groups: the Bailey Committee representing $1,500,000. of Tower Bonds; the Dunham Committee representing $1,000,000. of such Bonds; and the Gochenour Group representing at most $85,000. of such Bonds. The Special Master did not state that petitioners' claims in this respect were "untrue" but instead said that they were "not a statement of the whole truth." The Special Master's express adoption of the Securities and Exchange Commission's recommendations requires recognition that one-third of his allowance to petitioners was for services in the matter of the rejection of the 1937 Plan and related matters other than elimination of claims.

Petitioners did not object to the 1938 Plan and the defeat of the same was caused by the objections of the Securities and Exchange Commission.

The 1940 Plan was adopted. It is true that petitioners permitted the Subsidiary Debtor in its letter urging acceptance of this Plan to say that it had the support of petitioners' clients. The record does not show that petitions made any other contribution to the 1940 Plan. Petitioners' claim of a close resemblance between their sug-

gested amendments to the 1937 Plan, and the adopted framework of the 1940 Plan, fails upon close analysis.

Elimination of Claims. The Securities and Exchange Commission's recommendation, the Special Master's report and the District Judge's order are all tied together by the Special Master's adoption of the Commission's "comment" upon petitioners' application, and the District Court's adoption of the Special Master's report. These tie-ups definitely indicate an allowance of $12,000. for elimination of claims, chiefly for the partially successful attack upon the Morgan claim, but also including any compensable services with reference to other claims. Petitioners' brief here complains of the alleged failure to make any allowance in respect of the Van Sweringen Corporation's claim. Petitioners have distorted and misquoted the Special Master's report in several respects so as to give it a color of prejudice which, in fact, it does not have. Petitioners attacked the Van Sweringen Corporation's entire cause of action on grounds which, if established, would have defeated it entirely; and their attack on the interest was only incidental. Other counsel attacked the interest only, on grounds which went to that point alone, and succeeded in establishing these grounds. The Special Master did not find petitioners' services were non-compensable but said they were of "negligible value" in contributing to the ultimate result. The Terminal Building Company claim fell in the same category.

Expenses. Many items were not supported by vouchers, and others are urged in contravention of the order of the Circuit Court of Appeals in *Gochenour vs. Morgan.* Many others were incurred without authority from the Court, just as were most of the services attempted to be rendered by petitioners herein—volunteered without the basis of any responsibility placed upon petitioners with reference to them by Court order or otherwise.

Procedure. Petitioners made no proffer of evidence. They object to remandment. They had ample opportunity to put all of their claims and arguments before the District Judge in writing; and they did so. In substance, the requirements of F. R. C. P. 53 (e)(2) were fully met.

Petitioners were afforded every opportunity to file briefs and present all their points and claims, but they made no proffer of additional evidence, they gave no statement of what additional proof, if any, they desired to make, and none of their evidence was excluded.

IV. ARGUMENT.

A. THE DISTRICT JUDGE DID NOT FAIL TO EXAMINE THE EVIDENCE.

Petitioners charge that the District Judge "refused to examine the evidence." (Brief, pages 5, 16, and 20.) On the contrary the opinion affirmatively shows (R. I, 205) that the Judge examined the applications, the Master's report, the exceptions, the reasonableness of the Master's allowances, the benefits to the estate and the contributions to the confirmation of the Plan, saying (R. I, 205):

> "From an examination of the *applications* and the *Master's report,* and a consideration of the *exceptions* to his recommendations, it seems to me that the Master has endeavored fairly to appraise the various services with due regard to their *reasonableness,* their *benefit* to the administration of the estate, and to their *contribution* to the confirmation of the plan." (Emphasis ours.)

F. R. C. P. 52 (a) provides that "The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court." Accordingly, it was unnecessary for the judge to make separate findings. In a somewhat similar situation, the Judge in *Joyce, Inc. vs. Fern Shoe Co., et al.* (U. S. D. C., S. D. Cal., Cen. Div. 1940) 32 F. Supp. 401, said at p. 404:

> "But I believe that the spirit of the new rules which dispenses even with the necessity of findings by the court when we agree with the master's conclusions, Rule 52 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, calls for a full statement of our views only as to the matters on which we disagree."

Later in the opinion in the instant case the Judge states that a detailed opinion is unnecessary (R. I, 206), saying "It will not be possible to analyze the voluminous charges and set down my comment and appraisals." Far from indicating a failure to consider the problems presented, this, on the contrary, shows that the Judge had made an analysis and had in mind his "comment and appraisals." He then continued,

> "* * *; suffice it to say, that I have given what seems to me to be fair consideration to the claims and exceptions of the various parties and persons." (R. I, 206.)

The opinion concludes with a paragraph making reference to the familiar principle that a tribunal which has seen and heard the parties and the witnesses and had the first hand opportunity to be close to the situation has a presumption in favor of its results which should be given due weight where the reviewer is in some doubt from the cold written record and might possibly have varied the results somewhat, if he had been acting in the first instance himself. Surely this wise adherence to a familiar principle of judicial decision in reviewing the Master's findings is not to be interpreted as a refusal to examine the evidence.

Furthermore, it is elementary that the court speaks through its Journal and in the first paragraph of the Journal (R. I, 208) the court says that the cause came on upon the report of the Special Master, "upon the various objections and exceptions thereto and *upon the evidence*, and upon consideration thereof, it is hereby ordered," etc. (Emphasis ours). This again is an affirmative assertion that the court did examine the record.

B. THE ALLOWANCE WAS ADEQUATE IF NOT EXCESSIVE.

a. Rules of Law Applicable.

1. "Unless clearly erroneous" the Master's findings of fact were required to be accepted by the District Court F. R. C. P. 53 (e)(2),* and by No. 47** of the General Orders in Bankruptcy. This test requires, in order to upset a Master's finding of fact, a clear demonstration that it is wrong. This rule must be constantly borne in mind while considering each claim of service rendered, and the action of the District Court with reference to the same.

These two rules of practice prescribed by the Supreme Court merely apply the general principle that is consistently followed in this Court (*Crawford vs. Neal*, 144 U. S. 585, 596, 601; *Davis vs. Schwartz*, 155 U. S. 631, 636), and in all of the subordinate Federal Courts including the United States Circuit Court of Apeals for the Sixth Circuit. (*Continental Casualty Company vs. Barnett*, 134 Fed. (2nd), 725; and *Kowalsky vs. American Employers' Ins. Co.*, 1937, 90 Fed. (2nd), 476, 480, and cases therein cited.)

2. The Court before which legal services are rendered, in fixing the compensation to be paid therefor, may give weight to facts within the Court's own observation and knowledge. (*In re New York Investors, Inc.*, 130 Fed. (2nd) 90, 92; *Cooke vs. Bowersock et al.*, 122 Fed. (2nd) 977, 981; *Silver et al. vs. Scullin Steel Co.*, 98 Fed. (2nd) 503; 7

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* "In an action to be tried without a jury the Court shall accept the master's findings of fact unless clearly erroneous. * * *." F. R. C. P. 53 (e)(2).

** "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. * * *" This is made applicable in corporate reorganizations, by General Order in Bankruptcy No. 52 (2).

C. J. S. 1093; *Tracy et al. vs. Spitzer-Rorick Trust & Savings Bank,* 12 Fed. (2nd) 755; *Farmers, etc., Co. et al. vs. McClure,* 78 Fed. 209, 210; *Associated Towel & Linen Supply Co.,* 7 Fed. Supp. 699.)

3. Compensation to volunteers, not the appointees of the Court, is strictly limited. It will be noted that petitioners were not the appointees of the Court and that Messrs. Fogg and Leckie, Supervisors (who, by direction of the Court, acted as their own counsel) and also Special Counsel who acted in particular cases at the direction of the Court, are castigated in petitioners' brief wherever the petitioners unsuccessfully sought compensation for services rendered in matters where the Court did allow compensation to its own appointees for services rendered in connection with the same matters.

It is the trend of recent cases to refuse compensation out of the estate for services in corporate reorganization proceedings, to attorneys who, in a sense, are volunteers, not the appointees of the Court,—unless the approval of the Court was first obtained for the rendition of such services at the expense of the estate.

The rule has been receiving increasing recognition in recent cases that no compensation should be allowed to attorneys who are not appointees of the Court, unless the following elements conjoin,—viz:

1—They are beneficial to the estate;

2—The Trustee refused to act; and

3—Formal authorization was procured from the court in advance for authority to proceed.

To this effect see:

In re New York Investors, Inc., 130 F. (2d) 90, syllabus 1;

In re Porto Rican American Tobacco Co., 117 F. (2d) 599;

In re Progress Lektro Shave Corporation, 117 F. (2d) 602;

In re Postal Telegraph & Cable Corporation, 119 F. (2d) 861;

In re Eureka Upholstering Co., 48 F. (2d) 95.

4. Allowances are discretionary with the Court.

Whether any fees are allowed, and the amount, if allowed, are within the sound discretion of the Court before which the alleged services were rendered, and the Court's judgment thereon will not be overruled unless clearly contrary to, or unsupported by, the evidence. (*Mercantile-Commerce Bank & Trust Co. et al. vs. Southeast Arkansas Levee Dist. et al.,* 106 Fed. (2nd) 966, 972; *Campbell et al. vs. Green,* 112 Fed. (2nd) 143, 144; *Forbes vs. American Mail Line,* 115 Fed. (2nd) 196; *Palmer vs. Paramount Pictures Inc.,* 85 Fed. (2nd) 588; *Silver et al. vs. Scullin Steel Co.,* 98 Fed. (2nd) 503.)

Petitioner to be entitled to any allowance for services must bring himself within the purview either of Section 642 or of Section 643, Title 11, U. S. C. A. (Sections 242 and 243 of the Federal Bankruptcy Act.)

In both of these sections the allowance is discretionary.

The pertinent portion of Section 642 reads:

> "The Judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with the plan approved by the Judge, whether or not accepted by creditors and stockholders or finally confirmed by the Judge—
>
> "(1) By * * * committees or representatives of creditors or stockholders; * * *
>
> "(3) By the attorneys or agents for any of the foregoing except the Securities and Exchange Commission."

Note that the compensation *may be allowed,* either in connection with the *administration* of an estate or in connection with a *plan approved* by the Judge.

Section 643 is somewhat more comprehensive in scope and permits the allowance of such compensation or reimbursement for services

> "in connection with the submission * * * of suggestions for a plan, or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances the Judge shall give consideration only to the services which contributed to the plan confirmed, or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, * * *."

Having these general rules in mind we may now proceed to examine the particular services rendered, and the claims in connection therewith, to see whether the findings below are supported by evidence. We submit that the examination discloses that each finding was amply supported by adequate evidence.

b. Discussion of Specific Services.

1. *Independent supervision.* The Special Master found:

> "Petitioners herein contributed nothing and participated in no manner in the matter of the appointment of Supervisors for Subsidiary Debtor." (R. I, page 181.)

This finding of fact must stand "unless clearly erroneous." It is supported not only by the Special Master's personal knowledge of the details of the administration throughout the period of the reorganization and by the evidence brought before the Special Master upon the applications of other counsel who participated in the administrative details, but also by the facts indicated in

the following documents which were a part of the record before the Special Master, to-wit:

1. The District Judge's memorandum of October 15, 1936 directing the Special Master to look into the problem of leaving the Debtor and Subsidiary Debtor in possession and into other problems. (R. I, 180-217.)

2. The Special Master's order for meeting of creditors to consider the problem of leaving the Debtor and Subsidiary Debtor in possession and other problems. (R. I, 218.)

3. The Special Master's report of December 31, 1936 recommending that The Cleveland Terminals Building Company be continued in possession without the appointment of Trustees. (R. I, 224-226.)

4. The Special Master's report of December 31, 1936 recommending against continuing Van Sweringen Corporation in possession and recommending the appointment of Trustees therefor. (R. I, 227-228.)

5. The Special Master's report of January 26, 1938 recommending the appointment of Trustees for The Cleveland Terminals Building Company at that time. (R. I, 232.)

6. The Judge's modification of the action recommended, by appointing Supervisors (R. I, 236) for Subsidiary Debtor instead of Trustees.

7. The applications for compensation in respect of this matter, filed by various other counsel, and the evidence adduced in support thereof.

Thus there is ample evidence to sustain the Special Master's finding that there was no benefit to the estate here under discussion (Subsidiary Debtor's estate); and certainly the finding cannot be said to be "clearly erroneous."

2. *Salaries reduced.* Petitioners no longer make any claim of being the prime mover toward this result (Section 77 B (c) enjoined this duty of investigating and fixing salaries upon the District Judge and he performed it) so that petitioners' abandonment of this claim seems well advised.

3. *Segregation of Tower funds.* The Special Master found:

> "From all of the foregoing it is respectfully submitted that the petitioners herein performed no services in the respect alleged. Their statement to the effect that their services benefited the estate in this regard are not in accordance with the facts of the case and (that) they are entitled to no compensation therefor." (R. I, 186.)

This finding of fact was supported by the following documents in the record before the Special Master:

1. Gochenour's application to intervene, and proposed petition of intervener including a suggestion for segregation of Tower funds, filed March 13, 1937. (R. I, 239.)

2. The application of Gochenour and others, being a duplicate of No. 1 except for the inclusion of other applicants, dated March 20, 1937. (R. I, 239.)

3. The brief of Subsidiary Debtor opposing the foregoing applications to intervene and setting forth that Subsidiary Debtor had long before instituted and was still continuing the practice of segregating all funds collected by it from the Terminal Tower Building. (R. I, 243.)

4. The Special Master's findings and orders denying intervention, dated June 4, 1937. (R. I, 243-246.)

5. The petition of the Trustee of the Tower Bond Issue to intervene filed September 30, 1938. (R. I, 314, Item 5.)

6. The petition for segregation attached to No. 5 above dated September 30, 1938. (R. I, 247-248.)

7. The Special Master's notice of hearing upon the same. (R. I, 248.)

8. Transcript of the hearing on the same held on October 21, 1938 and showing that petitioners did not attend and were not represented at said meeting. (R. I, 248.)

9. The objections of Subsidiary Debtor filed on November 21, 1938. (R. I, 185 and 249.)

10. Transcript of the second hearing, occurring November 23, 1938, at which one of the petitioners attended but did not participate in the proceedings or the examination of witnesses. (R. I, 185 and 248.)

11. The answer of J. P. Morgan & Company filed December 2, 1938. (R. I, 185 and 249.)

12. Transcript of testimony at third hearing occurring December 2, 1938, at which petitioners did not attend and were not represented. (R. I, 185 and 249.)

13. Various briefs filed by Central National Bank, Indenture Trustee, by Subsidiary Debtor, by J. P. Morgan & Company and by the New York Terminal Tower Bondholders Committee. (R. I, 185.)

14. The findings and orders of the Special Master dated March 14, 1939. (R. I, 249-251.)

15. The applications for compensation in reference to segregation of Tower funds, filed by the Trustee of the Tower Bond Issue and its own counsel, and the evidence adduced in support thereof.

16. The testimony of Mr. Stern, who was appellants' local counsel, to the effect that he took no part "in the work of causing the sequestration of the Tower funds." (R. I, 139.)

In the face of all this evidence, this finding of fact by the Master is certainly not shown to be "clearly erroneous"; and therefore it must stand.

4. *The Chamber of Commerce Lease.* This lease was neither rejected nor cancelled. (R. I, page 187.) It expired by lapse of time, and the tenant occupied the premises until the expiration of the stated term. (R. I, page 187.) The tenant failed to exercise its option of renewal. The Special Master found:

"Petitioners herein in no way contributed or participated in the matter of the disposition of the Chamber of Commerce lease question in these proceedings, and are entitled to no compensation in connection therewith." (R. I, 187.)

Documents in the record before the Special Master which supported this finding were:

1. The Adams Group petition to intervene dated November 10, 1936. (R. I, 220-221.)

2. The Special Master's order allowing such intervention dated November 12, 1936. (R. I, 222.)

3. The application of the Adams Group requesting rejection of the Chamber of Commerce lease filed March 8, 1937. (R. I, 237 and 238.)

4. The proposed intervening petition of A. B. Gochenour, *et al.*, including a similar prayer for cancellation of the Chamber of Commerce lease filed March 13, 1937, and again March 20, 1937. (R. I, 239-243.)

5. The Special Master's findings and orders upon the last named petition to intervene dated June 4, 1937. (R. I, 243-246.)

6. The applications for compensation in respect of this matter, filed by counsel for the Subsidiary Debtor, by counsel for the Adams Group, and by other counsel, and the evidence adduced in support thereof.

Here again petitioners utterly fail to show that the Special Master's finding is "clearly erroneous."

5. *Rejection of 1937 and 1938 Plans.* The Special Master found that:

> "The statement, therefore, that because of petitioners' efforts 'the unfair plans of Debtor and Subsidiary Debtor were rejected' is not a statement of the whole truth." (R. I, page 188.)

The Master's report recognizes (R. I, 187-188) that petitioners, representing at most $85,000. of bonds, objected to the 1937 Plan and points out that the Bailey Committee of Terminal Tower Bondholders representing $1,500,000. of Tower Bonds and the Dunham Committee representing over $1,000,000. of Tower Bonds also objected. The Special Master's adoption and incorporation (R. II, 64) of the

comments of the Securities and Exchange Commission on the petitioners' fees clearly shows that he allowed $6,000. of fees in respect of administrative matters and plans of reorganization and charged the same to the Tower Fund. The petitioners' assertion, therefore, that he called their claim in this respect "untrue" and that he allowed them nothing except for elimination of claims is completely overthrown by the written record.

On the matter of the 1938 Plan petitioners filed no objections (R. I, 188), although the 1938 Plan failed to adopt any of petitioners' suggestions for a Tower Plan. This plan was accepted by the Creditors but failed of confirmation by the Court because of the objections of the Securities and Exchange Commission. (R. I, 188 and R. I, 280-286.)

The Special Master had before him the applications for compensation in respect of these plans and their failure (particularly on the objections to the 1937 Plan filed by counsel for the said Bailey Committee and Dunham Committee) and the evidence adduced in support thereof. Here it certainly cannot be said that the Special Master's finding was "clearly erroneous" in pointing out that applicants played only a minor role in defeating the 1937 Plan, and none whatever in the downfall of the 1938 Plan.

6. *Adoption of the 1940 Plan.* The Special Master says unequivocably in his finding:

> "The record shows no contributions offered by petitioners to the Plan of Reorganization which was adopted." (R. I, page 188.)

It is true that petitioners permitted the Subsidiary Debtor to say in a letter to bondholders that said Plan

> "has the support of the following bondholders groups"

naming four committees and adding "A. B. Gochenour, *et al.*" (R. I, page 317); but petitioners' claim that their objections to the original Plan of Reorganization were the

basis of the Plan ultimately adopted is entirely unwarranted. Petitioners claim to have suggested the valuation of Three Million Dollars ($3,000,000.00) that was ultimately adopted for the Tower; but reference to their 1937 objections and proposed amendments (R. I, pages 94 to 99, 272 to 275) shows that they suggested no valuation whatever. They merely suggested a reduction of the bond issue to Three Million Dollars ($3,000,000.00); but the same reference shows that they suggested no valuation figure at all.

Petitioners suggested that the bondholders get all of the stock (R. I, page 98); but the Plan gives them only seventy per cent (70%) of it. (See 1940 Plan, page 13.)

Petitioners claimed to have suggested in 1937, an "allowance of a general claim for the balance of the Three Million Dollars ($3,000,000.00) plus accrued interest," whereas they actually (R. I, page 198) named no amount whatever.

The obvious suggestions of appraisal, of Court approval of charter, by-laws and personnel of the reorganized company, and of preservation of a right of accounting against officers and directors were items which might and probably should have appeared in any Plan; and the slight resemblance of the 1940 Plan to the 1937 Plan in these respects constitutes petitioners' only possible claim of contribution to the 1940 Plan.

The Special Master had before him the applications of other counsel in respect of preparing and contributing to the Plan eventually adopted, and the evidence produced in support thereof. It must have been clear to him that the present petitioners, like the applicant in the *Schulte Retail Stores Corporation* case, C. C. H. Bankruptcy Service, paragraph 53437 (S. D. N. Y., 1941) were not "instrumental" in bringing about the Plan, but merely played the role "of only a critical spectator *ab extra* of the submission by others of proposed plans."

Certainly petitioners have not shown that the Master's finding that "the record shows no contributions offered by petitioners to the Plan of Reorganization which was adopted" was "clearly erroneous"; and unless petitioners bear that burden, the Special Master and the District Court should be sustained.

7. *Elimination of Claims.* In the Circuit Court of Appeals, petitioners were apparently satisfied with the full credit awarded to them for contesting the Morgan claim, as above mentioned; and their brief made no complaint about the denial of compensation to them in connection with claims presented by Midamerica Corporation.

In connection, however, with the Court's disallowance of interest on the claims of Van Sweringen Corporation and The Terminal Building Company, the Special Master's finding of fact was that:

> "Any contribution made by petitioners as to said item was of negligible value." (R. I, page 190.)

Petitioners' efforts had been directed chiefly at issues which, if successful, would have defeated each claim entirely. Of course the interest would have been defeated with the principal. These efforts were unsuccessful. Other counsel made their attack directly and solely upon the issues affecting interest only; and the interest was disallowed. Bearing in mind that allowances (particularly to volunteers) are discretionary with the Court, and bearing in mind the circumstances mentioned, certainly it cannot be said that the finding was "clearly erroneous"; and unless so, it must be sustained. (F. R. C. P. 53 (e) (2) and General Order No. 47.)

8. *Expenses.* In *Gochenour vs. Morgan, et al.,* 111 F. 2d 378, the Circuit Court of Appeals apportioned 80% of the costs to Gochenour and 20% to Morgan. (R. I, 191.) Gochenour now seeks to throw his 80% back on the estate, by having them allowed in this proceeding. (R. I, 191.) This should not be allowed.

The report also culled out items for which vouchers were not presented; and yet afterwards in the District Court petitioners did not even make a proffer of evidence, to show the vouchers that would have supported their claims.

Many of their expenses were incurred in the same way as their services were attempted to be enforced upon the estate and the Court, and are entitled to no more recognition than the alleged services.

There is no showing that the Master's findings of fact on the issue of expenses were "clearly erroneous." On the contrary, the record shows them clearly correct, and they should be sustained.

C. NO HEARING WAS NECESSARY WHERE NO EVIDENCE WAS OFFERED.

Finally, it remains to deal with petitioners' contention that they were not given a hearing in the District Court as required by F. R. C. P. Rule 53 (e)(2). This requirement is not for an "oral hearing," which may be dispensed with as provided in rule 78 (see *post*), but only for a "hearing."

When the Special Master's report was filed on May 23, 1942, five and one-half months had elapsed after more than a week of testimony on the subject of fees. During this period ample opportunity had been given for the filing of all the briefs the petitioners wished for.

Attached to the report was a notice of a hearing to be held before the District Judge on June 13, 1942. (R. II, 69.) On June 1, 1942 the District Judge entered an order (R. II, 70) postponing the hearing indefinitely and stating that the clerk would give notice later. No such notice was ever given, but during this period, and afterward, petitioners' objections and exceptions were filed and ample opportunity was given—and availed of—for the filing of briefs and reply briefs. Petitioners had every opportunity to make every argument they desired and to make those arguments

in the measured terms of the written thesis rather than in the hasty phrases of oral debate. Petitioners now complain that they wished to present oral evidence; but during all that time there was no proffer of evidence to be submitted, and no statement of what petitioners expected that such evidence would prove. Such proffer and statement are always conditions of the right to a rehearing or a new trial on the ground of exclusion of evidence that should have been admitted. The general rule is stated in all the digests. See 2 *R. C. L.* 78; 4 *C. J. S.* 580; 3 *Am. Jur.* 97. The same principle has now been adopted as a rule for procedure in federal courts (see F. R. C. P. 43 (c))* and as such was binding upon petitioners in this case.

Moreover F. R. C. P. 78 provides in part:

> "To expedite its business, the court may make *provision* by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition." (Emphasis ours.)

This "provision" the District Court has made by a rule which is quoted in every notice of the filing of a Special Master's report and which will be found in the record of the notice of every report filed herein by the Special Master. This printed or mimeographed rule in such notice reads as follows:

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*"RECORD OF EXCLUDED EVIDENCE. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged."

"Briefs in support of objections should be served with the objections and the adverse party is allowed ten (10) days to serve a reply brief.

"No oral argument will be heard unless requested by the Court."

This is exactly the practice which was followed in the instant case. The Special Master's recommendation was equivalent to a motion under Rule 53 (e) (2). Notice was given under the same rule and oral hearing was dispensed with, in the absence of a proffer of evidence, under Rule 78, after the filing of briefs.

As respects the alleged errors in the confirmation of the Master's report by the Court, it is claimed that under Rule 53(e)(2), an interested party is entitled both to an oral hearing and to introduce new evidence when a Court is considering the confirmation of a report to him of a Master, and of objections to the Master's findings.

Rule 53(e)(2) reads as follows:

"In an action to be tried without a jury the court shall accept the Master's findings of fact unless clearly erroneous. Within ten (10) days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

It is to be noted that, upon the face of this rule, there is no suggestion of any absolute right to introduce new evidence before the court. The language is that the court "*may* receive further evidence."

And while there is mention of a "hearing," this does not necessarily imply an oral hearing.

Further it is to be noted that both under this Rule and under General Order No. 47, the presumption is in favor of the Master's findings. The Court "shall accept the Master's findings unless clearly erroneous."

Obviously, the point is raised as a technicality only. The fact is that petitioners had a hearing, although not an oral one.

D. CONCLUSION.

Allowances are discretionary with the Court. Each finding was amply supported by adequate evidence. No proffer of additional evidence was made, and petitioners had every opportunity that an oral hearing would have afforded, and in some respects a better one. There is no showing that any finding was "clearly erroneous" but, on the contrary, examination of the record amply supports the findings that were made. The allowance to petitioners was adequate, if not excessive.

Respectfully submitted,

I. Walter Sharp,

J. Hall Kellogg,

Counsel for Respondent.

Hauxhurst, Inglis, Sharp & Cull,

Of Counsel.

APPENDIX.

Comments of the Securities and Exchange Commission upon the Abrams' Application.

CLEVELAND TERMINALS BUILDING COMPANY

Specific Recommendations for Allowances

	APPLICANT	REQUESTED		RECOMMENDED		
		Fees	Expenses	Fees	Expenses	Suggested Allocation
28.	**Joseph L. Stern, Meyer Abrams and Harry J. Myerson** Counsel for Gochenour, et al.	$172,200.00	$6,126.35	$18,000.00	$5,339.51	General 66⅔% Tower 33⅓%

COMMENTS

These attorneys represented Tower bondholders owning approximately $85,000 of bonds. In 1940 they undertook also to represent a note holder of Van Sweringen Corporation, the parent company and principal unsecured creditor of CTB. These interests were in conflict with respect to the claim of Van Sweringen Corporation against CTB and with respect to the CTB plan, since the Tower bondholders were primarily secured creditors. However, it appears that the litigation concerning the Van Sweringen Corporation claim was terminated prior to the applicants' representation of the Van Sweringen Corporation note holder, and it further appears that the applicants were not active in connection with plan negotiations after that time. Presumably, their inactivity in this connection was in recognition of the conflict of interests. Although the question is not free from doubt, the recommendations below are predicated on the assumption that the doctrine of the *Woods* case is not applicable to bar compensation under these circumstances.

The applicants claim responsibility for the appointment of trustees for Van Sweringen Corporation and supervisors for CTB. Services in connection with the appoint-

ment of trustees for Van Sweringen Corporation are not compensable in this proceeding. As for the CTB supervisors, the record fails to show that they were appointed in response to the applicants' objections to continuance of the debtor in possession. On the contrary, the court's order of February 8, 1938 appointing supervisors for CTB was based on a report of the Special Master recommending the appointment of a trustee or trustees for CTB in view of the resignations of Bradley and Murphy as its principal officers. The Master stated that loss of morale and efficiency was threatened "unless disinterested management responsible to the court only, be promptly installed." It further appears that there was no opposition to the Master's recommendation except from counsel for CTB and counsel for one of the creditors.

The applicants apparently instigated the attack on the 1937 plan and were instrumental in bringing about its defeat. The plan does not appear to have received much support from any source other than the debtor itself and it cannot be said that the plan would have been approved in the absence of the opposition from the applicants. However, the time spent in opposing this plan would seem to be compensable. Although the plan ultimately approved and confirmed bears some similarity to the type of plan originally advocated by the applicants, it does not appear that they were active either in the negotiation or formulation of that plan. The services rendered in connection with their unsuccessful attempt to have the Tower income sequestered in a separate fund and with respect to the development of possible causes of action and the appointment of an examiner have not contributed any direct benefit to the estate. In this connection, it may be noted that the applicants' unsuccessful suit against the indenture trustee for the Tower bonds on similar causes of action will result in burdening the trust estate with the cost (over $18,000 of the amount requested is allowed) of defending that litigation. For the

services described thus far $6,000 would seem to be the maximum amount of compensation chargeable against the Tower funds.

Most of the services rendered by the applicants were in connection with the reduction or elimination of large unsecured claims against CTB. After extensive litigation, applicants were successful in having approximately $6,000,000 of the $27,777,718 Morgan claim subordinated to the claims of other general creditors. No part of the claim based on the Tower bonds had been classified as unsecured at the time of this litigation and it is consequently difficult to understand what interest applicants were representing during this period. However, such litigation contributed in establishing a proper classification of unsecured claims and in that sense was beneficial to the general estate. In response largely to the Commission's opposition to the 1938 Tower plan, a part of the Tower bond claim was eventually classified as a deficiency claim with the result that the Tower bondholders have benefited somewhat from the reduction of the Morgan and other large unsecured claims. Such benefit is not substantial, however, since the deficiency claim of the Tower bonds is less than 8½% of the total unsecured claims and the value of the assets available for unsecured creditors would probably not exceed $2,000,000. The applicants also filed early objections to the principal as well as the interest of the Van Sweringen Corporation claim ($37,376,251) and the Terminal Building Company claim ($1,153,143). Objections to the interest on these claims were likewise filed by Morgan, however, and it appears that their counsel carried the principal burden of the litigation with respect to these claims, the interest on which was finally disallowed. Applicants spent considerable time on this matter, but their services largely duplicated those of counsel for Morgan. With respect to the Midamerica claims against CTB, applicants filed objections in August of 1937. Later that same

month special counsel was appointed to represent the debtor in connection with the Midamerica claims. Although the applicants instigated the attack on these claims and were doubtless of some assistance in opposing them, the major portion of their services in this connection must be regarded as duplicative of those rendered by special counsel appointed by the court. Any allowance of compensation to these applicants for services in connection with the reduction or elimination of claims should be confined mainly to reasonable compensation for the time spent (approximately 1000 hours) in obtaining partial subordination of the Morgan claim.

The expenses for which reimbursement is sought include a bill for $1,797.50 presented by Laubscher & Smith for accounting services rendered to the applicants at their request. It does not appear that any order was ever entered authorizing the employment of these accountants; the Master's order of November 9, 1937 merely authorized an examination of the books and records of CTB and its parent company through Laubscher & Smith. Although there is some authority for denying compensation to accountants or other experts employed without specific court authority (*In re Postal Telegraph & Cable Corporation*, 119 F. (2) 861 (C. C. A. 2d, 1941)), a reasonable allowance would appear to be permissible here. We suggest a reduction of $300 in the amount requested, however, in order to eliminate the charge for typing and checking accounting reports and to make an adjustment for the excessive amount of partners' time which is charged. The balance of the expense item includes an excessive amount of travel expenses. Abrams or Myerson made 30 round trips from Chicago to Cleveland, two to Washington and two to Cincinnati. Eighteen of the Cleveland trips were made after Stern had been retained as Cleveland counsel, and the necessity of such frequent trips during that period seems open to serious question. We suggest that the expenses

applicable to one of the Washington trips and half of the Cleveland trips made after Stern's retention as Cleveland counsel be eliminated from the requested amount. This reduction, together with the $300 reduction in the accountants' fee totals $786.84.

(3)

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943.

No. 415

MEYER ABRAMS, HARRY J. MYERSON AND FANNIE B. STERN, EXECUTRIX OF THE ESTATE OF JOSEPH L. STERN, DECEASED,

Petitioners,

v.

CLEVELAND TERMINALS BUILDING COMPANY,

Respondent.

On Petition for Writ of Certiorari.

PETITIONERS' REPLY.

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In The

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Petitioners,

v.

CLEVELAND TERMINALS BUILDING COMPANY,

Respondent.

On Petition for Writ of Certiorari.

PETITIONERS' REPLY.

The Question: Respondent says (p. 1) that the "single" issue before the Master and the District Court was "how much compensation should be allowed petitioners", which was "a question of fact", and that the issue in the Circuit Court of Appeals and before this Court is "Should the Court disturb the concurrent findings made below?" This is an *incorrect statement* as to the issues presented before the District Court, the Circuit Court of Appeals and before this Court. It is

true that the question before the Special Master was, as they state, "how much compensation should be allowed to the petitioners", but the question before the District Court was *different*. The Master recommended compensation for services rendered, under subdivision (b) of the petition (R. I. p. 4) and recommended the denial of *any compensation* for the services under subdivision (a). The *first* was a *factual* question, while the latter was purely a *legal* question. The question "how much compensation" should be allowed is a *factual* question, while the question whether *any* compensation should be allowed is purely a *legal* question (*Re American Air Lines,* 115 F. (2d) 196).

The question before the Circuit Court of Appeals *did not involve any factual questions* because the appeal was not taken from the allowance made by the Court under subdivision (b), but from the complete *denial* of *any* compensation under subdivision (a), and the appeal was allowed only from that *portion* of the decree (R. 1-2). While petitioners were dissatisfied with their allowance, yet they only appealed on *legal* questions insofar as they related to the total disallowance of *any* compensation for the services rendered in the field of administration, in opposition to the Plans, and the approval of the Final Plan. Neither the Circuit Court of Appeals nor this Court was presented with the question whether "the concurrent findings made below" should be disturbed for the obvious reason that *there were no "concurrent findings"* by the Court and the special Master, as *the Judge did not allow to the objectors the opportunity to have a "hearing"* and did not examine the evidence. We pointed out in the petition that a decision under such circumstances by a Judge *does not constitute a "concurrent finding" or decision.*

The question before the Circuit Court of Appeals, as well as before this Court is, whether the objectors who

complied with the order of the Court in filing their objections and who demanded a hearing which was denied, are entitled to their day in court, and whether the disposition of their objections without notice and hearing, in violation of Rule 53, constituted due process of law. This is primarily the question which is presented here on the petition for the Writ of Certiorari.

The Comment: Under the heading "Comments on Statement of Facts", Special Counsel appointed by the Special Master (R. I, p. 310) say on behalf of the respondent that according to petitioners "they have been the victims of a malignant combination" of a "biased" special Master, and of a District Judge who "did not examine the evidence" and of a Circuit Court of Appeals which ignored its "duty". *We never charged that there was a combination* between the special Master, the District Judge and the Circuit Court of Appeals. The charge against the special Master was that *he was biased.* The District Court did not afford an opportunity to the petitioners to offer evidence to sustain their charge, nor did it give them the opportunity to be "heard" under its *mistaken conception* that it had a right to pass upon the objections "without notice" and without a "hearing". The error in this respect was the basis for the complaint against the District Judge. We did not charge him with *any* bias. The complaint in the Circuit Court of Appeals is that it was mistaken in its construction of Rule 53 (e) 2, and because of its erroneous conclusion as to the effect of the rule, it erred in its judgment. In view of this record the "comments" are *unwarranted.*

The Recommendations: The assertion (p. 5) that the recommendation of the Master is "simply a lump sum" for "all" of the services of the "petitioners" is made for the purpose of justifying the

contention that there is only a *factual* question and *not* a *legal* question, and to justify the decision below which held that there were no legal questions involved. The falsity of the assertion appears from the findings of the Master. In his discussion under subdivision "1" relating to petitioners' services concerning administrative matters wherein they claim that their services benefited the estate, the Master concluded that the statement was "untrue" (R. 180), and that "petitioners have contributed *nothing*". Can it be said in good faith that this "*nothing*" was included in the "*lump sum*" and was included in "*all*" of the services rendered? The only irresistible conclusion is that compensation for *these services were totally denied.* This presents a *purely legal question,* as shown above.

Under subdivision "2", which was discussed by the Master (R. I, p. 181), he ended his finding with the conclusion that petitioners "*did not contribute anything*" and that their services did not contribute to the results (R. I, pp. 182, 183). The discussion under subdivision "3" (R. I, p. 183), ended with the words that petitioners "are entitled to *no compensation therefor*" (R. I, p. 186). The discussion of Item "4" (R. 186), also ended with the words that the petitioners were entitled "*to no compensation*" (R. I, p. 187), and such was his conclusion as to Item "6" (R. 188).

It is evident from the foregoing that *none* of these items were included in the alleged "lump sum", and were *totally denied.* It was therefore a *purely legal question* presented wholly distinct from the allowance which was not involved in the appeal, and is not involved here on the application for the Writ, and no review was ever sought from the allowance.

The Commission's Comments: On the one hand respondent relies on the comments of the Securities and Exchange Commission when it suits its purposes (p. 6), and on the other hand it ignored its comments when it recommended the allowance of $5,339.51 for the expenses (R. II, p. 102), whose recommendation was *ignored* by the Master and the Court and petitioners were only allowed $2,500 for such expenses. While the recommendations of the Securities and Exchange Commission were entitled to some consideration, yet this Commission did not participate at the hearings when petitioners performed their services, and its appearance was filed thereafter. It could only have gained its knowledge from the review of the record, which review is equally available to this Court, and neither the Special Master nor the Court paid much attention to its recommendations as to the various allowances.

The Commission recommended $13,500 to another claimant (R. II, p. 82) and the Master recommended $25,000 or 100% of the claim (R. II, p. 16). The Commission recommended the payment of $42,000 for another claim (R. II, p. 84), and the Master recommended $49,000, or 100% of the claim (R. II, p. 24). The Commission recommended to another applicant $12,500 (R. II, p. 84), and the Master recommended $17,500 (R. II, p. 45). The Commission recommended $12,500 to counsel for the Michigan Committee (R. II, p. 98), and the Master recommended $15,000 (R. II, p. 56). It recommended the allowance of $20,000 to counsel for the New York Committee (R. II, p. 98), and the Master recommended $22,500 (R. II, p. 47). It is evident therefore that the Master *did not follow the recommendations of the Commission.*

The Decision of the Judge: Respondent concedes (p. 7) that when the Master filed his report on May 16, 1942, he informed all parties that the matter will come on for hearing on June 13, 1942; that on June 1, 1942, the "**Judge**" changed the arrangements and "*postponed the hearing*" to "*a time to be hereinafter fixed by the court and noticed by the Clerk to the interested parties*". It further *concedes* that petitioners filed their Objections and Brief on June 5, 1942, and "*requested an oral hearing*" and such *request was not granted.* The matter was not "noticed" for "hearing" and no time was ever "fixed" for any hearing. It urges (p. 4) that "full opportunity" was given for the filing of briefs. Petitioners are not complaining that no opportunity was afforded them to file a brief. They requested *oral argument on the face of the objections* (R. I, p. 192), and concluded the Brief (R. I, p. 204) with the words "**Oral Hearing Is Requested**". In the face of such requests and the denial, without any *opportunity for a hearing,* the statement of Respondent as to the alleged *opportunity* is *unwarranted.*

The contention that "no *proffer* of evidence was made" and that after a "long interval appeared to indicate that all arguments had been made in writing", the court announced its decision on August 21, 1942, *is obviously not in accordance with the record.* Their statement that it *was indicated that all arguments had been made in writing* is *refuted by* the *written demand* in the objections (R. I, p. 192) which was repeated in the brief (R. I, p. 204).

The Argument: Respondent contends: (a) that the Judge examined the evidence; (b) that the allowance was adequate, and (c) that no hearing

was necessary, although requested by the objectors. We will show that there is no merit in any of the contentions.

A. The Judge Did Not Examine the Evidence.

In their attempt to convince this Court that the judge examined the evidence Respondent says (p. 11) that his opinion *affirmatively* shows "he examined the applications, the Master's Report, the exceptions, the reasonableness of the Master's allowances, the benefits to the estate and the contributions to the confirmation of the plan." The word *"evidence" does not appear in the quotation.*

Petitioners never contended that the court did not have the right to adopt the findings of the Master without making findings of its own and the citation of Rule 52 (a) was therefore unnecessary. *Our contention is that without reading the evidence a court may not make its own findings nor may it adopt the Master's findings.* Anyone reading the opinion of the District Court (R. I, p. 205) with an *unbiased mind* must come to the *irresistible conclusion* that the judge did *not* examine the evidence.

The contention (p. 12) that the journal entry containing the words "upon the evidence" controls, is without merit as it does not state that the court read or examined the evidence. The "entry" was prepared by Special Counsel based on the opinion of the judge, and the statement of the judge as to what he examined is controlling and not the journal entry.

B. The Adequacy of the Allowance Is Not in Issue.

The adequacy of the allowance was not at issue in the Circuit Court of Appeals, nor is it at issue on the appli-

cation for the writ of certiorari, as the appeal was only taken from that portion of the order which denied *any* compensation for the services in subdivision (a), and anything that is said in Respondent's answer on the adequacy of the compensation should be disregarded.

(a) "Rules of Law Applicable."

Rule 53 (e) 2 and Bankruptcy Order 47 are said to be (p. 13) controlling. Respondent only picked out of the rule the words "unless clearly erroneous" and lost sight of the remainder of the rule calling for "notice" and "hearing". Their discussion begins and ends with the words "unless clearly erroneous", which is constantly repeated and stressed. Respondent's *conception* of this rule *is "clearly erroneous"*, as the rule is *inapplicable* to findings which are based on deductions and inferences from documents and on evidence which is not in dispute. (*Kycoga Land Co.* v. *Kentucky River Canal Co.*, 110 F. (2d) 894, 896.) It is inapplicable to a case where the court *did not examine the evidence and did not accord the Objectors their "hearing"* which they were entitled to under that rule. It is inapplicable to the conclusion of the Master in discussing Item "6" and which is barren of all facts and where it was the duty of the District Court to make its own findings, as discussed in the petition (p. 38). The construction of this rule that Masters and Referees *may not substitute conclusions for findings and that this is in violation of the Rule,* was held in two decisions by the District Court of New York, which are not yet published and appear in C. C. H. Bankruptcy Law Reports, at ¶s. 54,484 and 44,490 (*Re George R. Buraw, Inc.* (S. D. N. Y.), rendered July 12, 1943, and *In re Ames Furniture Co., Inc.*, E. D. N. Y., rendered June 2, 1943).

We have no quarrel with the authorities which they cite (pp. 13-14) on the point that due regard must be given to the opportunity of the Judge to familiarize himself with the proceedings, and that the decision of a judge who did familiarize himself is entitled to weight. However, this judge *did not familiarize himself with the proceedings.* None of the proceedings took place in his court room, as he had *abdicated his functions to the special Master.* Most of the reports of the Master were not filed in court until several years thereafter, and *many orders which were to be entered by the court were entered by the Special Master* (R. I, 71, 100, 102, 218, 222, 231, 248, 243 and 310).

Whether or not volunteers are entitled to compensation *was not in issue below,* and the case was not decided on such an issue. Respondents have no right to urge a denial of the petition on issues which were never presented below.

We have no quarrel with the proposition (p. 15) that allowance of compensation is discretionary. The discretion, however, is *not arbitrary* and may only be exercised when the opportunity was afforded upon due "notice" and "hearing", pursuant to Rule 53 (e) 2.

1. **"Independent Supervision"**: The question whether petitioners' services resulted in the independent supervision as discussed in the petition (pp. 21-33), was fully argued there and need not be repeated. Respondent relies on various documentary proofs (p. 17) the inferences of which are open for review, and Rule 52 (a) has no application to such inferences and deductions.

2. "Salaries": Petitioners stated that they were not claiming any compensation under this item and therefore no reply is necessary as to this point.

3. "Segregation of Tower Funds": Respondent again relies on inferences and deductions from the undisputed evidence in support of its contention that the finding of the Master that the petitioners did not contribute anything is controlled by Rule 52 (a), and we have already shown that the rule is not applicable.

4. "Chamber of Commerce Lease": In an effort to minimize the services rendered which brought about the extinguishment of the costly lease to the Chamber of Commerce, whereby it lost from $12,000 to $25,000 per year annually, respondent says (p. 19) that the lease was neither rejected nor canceled, but expired by lapse of time. This allowance of the lease to expire by lapse of time and not to renew the option brought a loss to the estate of over $100,000 during the pendency of the 77B proceedings. The expiration of the lease was no obstacle for the Special Master to recommend the allowance of $15,000 to another attorney whose major contribution was with reference to the lease (R. I, p. 178). In enumerating the documents tending to support the Master's finding, respondent omitted reference to the documents which tend to *refute* his Report, as shown in the petition (pp. 34-35).

5. "Rejection of 1937 and 1938 Plans": Respondent says (p. 31) that petitioners misquoted in one instance the term applied by the Master to the statements as "untrue", while the

Master said that it was not a statement of the "whole truth". Sometimes a statement that one is not telling the "whole truth" is worse than a statement that one did not tell the truth. In either event a reading of the Master's report dealing with the rejection of the unfair plans cannot lead to a conclusion that the Master recommended *any reward* to petitioners for their services in this respect. The Master intended by his report to belittle any claim for services rendered in rejecting the 1937 plan (R. I, p. 168), saying "shortly after submission of the plan to the creditors it became apparent that acceptance thereof by the creditors was out of the question." He repeated the same thing in another report (R. I, p. 281) and in his report on fees he emphasized that the opposition was made by the two Committees who represented large blocks of bonds (R. I, p. 188). Such statements were not made in the interest of recommending to the court compensation to the petitioners. He would have at least mentioned that the Michigan Committee *was organized as a result of petitioners' objections to the plan and that it interposed objections* because of the information and conferences had with petitioners (R. I, p. 166), as we have shown in the petition (p. 36). He would have pointed out that this plan was sponsored by the Debtor, the Subsidiary, and their "executive officers" as well as the "general counsel" who solicited consents at an expense to the estate, which he *authorized* and that counsel for the Adams Group also sponsored the plan, all of which was omitted from his report. *One cannot read that part of the report with an unbiased mind and conclude that it intended to recommend a reward to petitioners for such services.* The statement (p. 21) that petitioners did not object to the 1938 plan is contradicted by the verified petition (R. I, p. 12), which was not even disputed. Here again counsel applied the test of "clearly erroneous" which is inapplicable to inferences from such documents.

6. "Adoption of the 1940 Plan": In discussing the single sentence of the Master that "the record shows no contributions offered by petitioners to the plan of reorganization which was adopted," counsel did not attempt to justify the conclusion (which a Master may not make without setting forth the facts) which placed the burden on the court to go through the *entire* record to see if the conclusion is justified and which it failed to do and failed to make any findings as required under the rule as construed in the decisions above cited. Respondent *concedes* (p. 21) that petitioners joined with the other Committees in recommending the adoption of the 1940 plan. They forgot, however, to state that petitioners *opposed* the unfair plan of 1937 and did *not join in recommending the other unfair plan of* 1938 and *only* joined the other creditors in recommending the acceptance of the *fair* plan of 1940.

Respondents dispute our statement (p. 22) that the "proposed amendments" of petitioners found their way in the 1940 plan. Although they seem to *rely* on the comments of the Commission which at least *conceded* (R. II, p. 104) that the 1940 plan "bears some similarity" to the plan proposed and "advocated" by the petitioners, yet when it suits their convenience they *disregard it.* It may be true that in asking to appraise the value of the leasehold estate we did not use the figure $3,000,000. We did, however, point out (R. I, p. 95) that the release of the bond issue for the securities to be issued by the Tower Building Corporation was unfair *"in view of the fact that the value of the leasehold estate is much less than the debt due on the* bond issue." We did ask in the "proposed amendments" to the plan (R. I, p. 98) that *an appraisal be made of the leasehold estate* and did suggest

that 50% of the appraised value be given in bonds and 50% in other securities secured by the Tower Building and *for the* balance of the debt "to the extent of the difference between the valuation of the property and the amount of the debt," *the bondholders be treated as general creditors.* In the original amendment to the plan we also suggested (R. I, p. 275) *"that the leasehold bondholders should participate as general creditors to the extent of the difference between the appraised value of the property and the face amount, plus accrued interest."* This is *exactly what was accomplished by the* 1940 *plan.*

Respondent says (p. 22) that petitioners did not propose that the bond issue be reduced to $3,000,000. Their proposal was that the bond issue be reduced to 50% of the appraised valuation and 50% should be given in common stock. The *two classes of securities would have given the leasehold bondholders everything that was represented by the equity* and security of the Tower Building, and for the balance it was suggested that they be treated as *general creditors.* This is the same result which was arrived at by the 1940 plan when the Tower Building was appraised at $3,000,000 by which the bondholders were given bonds for substantially that amount. It may be true that here and there there was a comma or a period missing between our proposed plan and the plan as finally adopted; the general concept and the scope of the plan, however, were there.

Counsel *concede* (p. 22) that certain suggestions which petitioners made were included in the final plan but say that such suggestions were rather "obvious." No matter how *obvious* they were after petitioners directed attention to the "obvious" they were *absent* from the 1937 plan which was permitted to be submitted to the bond-

holders and to solicit consents thereto at the expense of the estate, which was also recommended by the Adams Group and which was *not opposed* by the Trustees of the Debtor, *the appointees of the court.*

The Master's statement that the record does not show any contribution towards the 1940 plan is, therefore, *refuted by their own admission.* Here again respondents resorted to the "clearly erroneous" *test* which is not applicable to deductions and inferences. It is "clearly erroneous" to apply this rule to a "conclusion" of a Master without setting forth the facts under discussion of point "6" (R. I, p. 188) and as urged in objections to his report (R. I, p. 198).

7. "Elimination of Claims": Counsel call attention to the fact that petitioners were evidently satisfied with the allowance made for contesting the Morgan claim, as they made no mention in their brief of any complaint. Whether or not they were satisfied is of no importance, as they decided not to appeal from the allowance and merely appealed from the disallowance (R. I, pp. 1-2). They call attention to the Master's finding that the contribution of the petitioners "was of negligible value" and say that if petitioners were successful they would have not only eliminated the interest but also the principal. This does not warrant the total denial of compensation for bringing about the elimination of a claim for interest in excess of $10,000,000. That this resulted from petitioners' efforts was fully discussed in the petition (pp. 40-46).

8. "The Expenses": Respondent urges that the precedent of the Circuit Court of Appeals when it only allowed 20% for reimbursement of

costs in the Morgan Appeal is determined on the allowance of reimbursement of costs in the reorganization proceedings. This point was fully discussed in the petition (pp. 46-47) and no reply is deemed necessary. It should be noted, however, that the respondent relies on the recommendation of the Commission as to fees and found it necessary to reprint the comments of the Commission in their appendix to the brief (pp. 28-32), although such comments appear in their supplemental record (R. II, pp. 102-105), ignored the fact that the Commission only recommended a reduction of $300 from the expenses (p. 31) and recommended (R. II, p. 102) the allowance of $5339.51 instead of $2500, and also filed a brief in the Circuit Court of Appeals, *urging this allowance.* However, the court only allowed $2500 and if the recommendation of the Commission is entitled to any weight, it is certainly entitled to be considered on the question of expenses.

C. A Hearing Was Not Only Necessary But Mandatory, Under Rule 53 (e) 2.

Under the heading "No Hearing Was Necessary Where No Evidence Was Offered" respondent repeats (p. 39) the contention that Rule 53(e) 2 does not require an "oral hearing" but requires only a "hearing." This distinction between "hearing" and "oral hearing" is not founded on *any* authorities nor on the definition of the word "hearing" which implies the presence of the party in open court to present the matter to the judge and there can be no hearing without an opportunity to be heard. The term "hearing" presupposes proceedings "upon notice" (*In re Securities and Exchange Commission*, 84 Fed. (2d) 316, 318). A "hearing" is "an equity term" and is properly applied "to the argument" (*Mil-*

ler v. *Tobin*, 118 Fed. 609, 616). It includes "the testimony and the argument" (*West Chicago Park Commissioners* v. *Riddle*, 151 Ill. 487). The term "hearing" includes "argument" (*Harrison* v. *Commissioner of Internal Revenue*, 107 F. (2d) 341, 342). There, the court said (p. 342):

> "The general rule is that a hearing contemplates a reasonable opportunity to be heard in the presentation of evidence and argument."

The word "hearing" includes *"oral argument"* (*Wisconsin Tel. Co.* v. *Public Service Commission*, 232 Wis. 274, 294). It "presupposes" a formal proceeding "upon notice" and an opportunity "to be heard" (*In re Securities and Exchange Commission, supra*, 84 F. (2d) 316, 318).

Rule 78 on which counsel rely (p. 24) applies to "motions" and not to "hearing."

We have already commented on the contention that ample opportunity was given for the filing of briefs, and have shown that petitioners *did not waive the demand to be heard but insisted upon a hearing in court.* Counsel again repeat their statement that the order of June 1, 1942, changed the previous order of the Master to the effect that a hearing would be had on the objections on June 13, 1942, but that the hearing would be "postponed" and that it stated "that the Clerk would give notice later." They further concede that "No such notice was ever given." In the face of these admissions, the argument that petitioners had every opportunity to make every argument that they desired, is unwarranted. The subject matter of the "proffer of evidence" was already discussed above (pp. 5-6) and need not be repeated.

Respondent was unable to find a single case or precedent for the procedure, and for the propriety of notifying the attorneys that due notice would be given for a hearing and to thereafter dispose of the matter without notice and without a hearing.

For these reasons the Writ of Certiorari should be issued.

Respectfully submitted,

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